Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
October term 1996

Lars W. Ehrlander, Petitioner

v.

The State of Alaska, DOT, et al.

On Petition For Writ of Certiorari
to the Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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253 pp

1. Whether the Alaska Supreme Court abused process when on summary judgment: a) it *sua sponte* reversed the trial court's finding of inverse condemnation, (b) it reversed the trial court's leave to amend our complaint, on factual basis, without the benefit of the facts; c) it took on the role of a jury, d) it waived Constitutional rights on our behalf; e) it permitted the State to breach a Bifurcation Agreement that preserved several property rights for future litigation, after the State had benefited from part performance and after it was too late to appeal, resulting in the State's taking vested property rights absent compensation and in violation of most state and federal condemnation laws.

2. Whether the Alaska Supreme Court's adhering to state and federal laws is discretionary.

3. Whether the State, in eminent domain, acts in a fiduciary capacity.

4. Whether the Court erred in not finding a constitutional/civil rights violation when: our family was singled out to subsidize this highway, the State did not pay for fixed improvements ($350,000) or the added value attributed to those improvements and to the property's being subdivided, or for the highest and best use or the value on the date of taking; the State did not compensate for its failure to build an access road, for business damages, or for impairments resulting from condemnation blight. The State paid less than our cost and what we owed the bank, making us subject to a judicial foreclosure and substantially poorer.

LIST OF PARTIES

Mr. Lars W. Ehrlander, pro se petitioner.

v.

The State of Alaska, Department of Transportation, and
Mr. John Athens, State Counsel, in personal and official capacity.

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12-10-87 Judge Blair Oral Orders. Sets law of case.

03-21-88 . Amended Final Judgment on Jury Verdict.

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02-05-91 Judge Steinkruger Order. Permits amended complaint.

07-03-91 Alaska Supreme Court Order. Decreases must be disregarded. Reversed amended complaint. Issues limited to date of taking. Interest only as damages.

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10-15-92 Judge Steinkruger Order. Value and decreases will not be part of the pending trial.

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06-02-95 Judge Steinkruger denies our motion for sum. judgment.

12-13-95 Judge Savell Memorandum Decision dismissing all claims.

03-04-96 Judge Savell Final Judgment.

06-26-96 Judge Singleton (fed. distr. crt.) Order dismissing all issues.

07-19-96 Judge Singleton Order upholding dismissal on reconsid.

07-31-96 Alaska Supreme Court. Memorandum Opinion and Judgment upholding Judge Steinkruger's 2-3-93 ruling.

08-13-96 Alaska Supreme Court Order denying rehearing.

08-26-96 Judge Steinkruger Order denying final judgment in 886.

JURISDICTIONAL BASES FOR THIS COURT

1. The Final Order was entered on 7-31-96, the Alaska Supreme Court's Memorandum Opinion and Judgment upholding Judge Steinkruger's 2-2-93 ruling.

2. This case is related to a case under appeal with the Ninth Circuit [F-021]. (Rule 11)

3. The Alaska Supreme Court denied rehearing on 8-13-96.

4. This Court has jurisdiction to review the judgment by the Alaska Supreme Court under USC., 28 Sec. 1254, 1257.

CONSTITUTIONAL PROVS.- STATUTES - REGULATIONS

US Constitution

Article 3 Sec. 2

Article 4 Sec. 1, 2

Article 6.

Amdnt. 5, eminent domain.

Amdnt. 7, trial by jury.

Amdnt. 8, excessive fines.

Amdnt. 13, involuntary servitude.

Amdnt 14, due process of law.

Alaska Constitution Art. 1. Sec. 1.

Inherent rights.

A.C. Sec. 6, petition.

A.C. Sec. 7, due process.

A.C. Sec. 14, seizures.

A.C. Sec. 16, trial by jury.

A.C. Sec. 18, eminent domain.

AS 09.10.070

AS 09.25.010

AS 09.25.020 (1)(4)

AS 09.45.630

AS 09.55.310 (1)(2)

AS 09.55.320

AS 09.55.330

AS 09.55.370

AS 09.55.430 (3)

AS 09.55.460 (b)

AS 24.40.010

AS 34.40.090

AS 34.55.004 (1)(2)(3)

AS 34.55.046

AS34.60.040(1)(2)(3c,a)

AS 34.60.070

AS 34.60.090 (4)

AS 34.60.120 (3)(9)

AS 34.60.130. (a)(b)

AS 34.60.150

AS 44.88.38

USCS 23 Sec. 127 (b)

USC 28 Sec. 1331,

USC 28 Sec. 1343(a)

USC 28 Sec.1346(a2)(b)

USC 28 Sec. 1347

USC 28 Sec. 1355

USC 28 Sec. 1358

USC 28 Sec. 1367

USC 42 sec. 1983

USC 42 Sec. 1985 (2)

USC 42 Sec. 1986

49 CFR Sec. 24.101

49 CFR Sec. 24.102

49 CFR Sec. 24.103

49 CFR Sec. 24.103 (b)

49 CFR Sec. 24.304

49 CFR Sec. 24.306

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Canon 2, 3.

STATEMENT OF THE CASE

FACTUAL STATEMENT.

In 1983, the Fairbanks North Star Borough, doing highway planning as an agent for the State of Alaska DOT, acted on DOT's request to deny the part of our proposed subdivision that could be impacted by a proposed highway project. [p.117, 120, 121, 229, 239] DOT communicated its needs and intentions through several letters, memos, and in meetings [p.141]. The subdivision denial was appealed to the Planning Commission by a third party and the case was kept in the process long enough so that the DOT would have time to decide whether our land would bee needed. On 12-6-83, our land was chosen by DOT and the Planning Commission [p. 124], as the location for the pending project. Replotting not affected by the highway project was approved on 2-21-84 [p.245]. DOT committed to using the advanced acquisition program during the summer of 1984 [p.120, 121, 128, 239]. In retrospect, this commitment appears to have been nothing more than a ploy to get the Borough to go along with the State's effort to freeze the part of our development that could be impacted by the proposed highway [p.243]. Our loan payments exceeded $15,000 a month and the property taxes were substantial in this prime location. At the time, DOT contemplated taking only a 200 ft easement across our property leaving a remnant south of the road [p. 245]. We therefore had to bring in utilities and improve the entire area and re-engineer to accommodate

the highway. The improvements were accepted and adopted by the City of Fairbanks on 9-12-83 [p, 117, 141, 177, 241]. Most of the approved land was sold during 1984-85 in block sales from $4.00 to 4.95 sf. [p. 133, 245]

On 4-29-86, the State formally took the property. It also took the remnant south of the road. The project had been upgraded to a high speed freeway with limited access along with an elaborate two level intersection. The State took 4 fully improved city lots subject to all city services [p. 133(40), 245]. Was it not for the blight created by the highway project, the State would have taken 15 lots [p.242]. The area was improved to facilitate 15 lots but it had not been recorded as such because of the denial caused by the pending highway. Alaska Statute AS 34.60.120 (3) [p.217], and federal regulation 49 FRC Sec. 24.103 (b) [p.220] provides that highway impairments must not be included in a condemnation appraisal. This provision was ignored by the State together with all other statutory appraisal provisions [p.213, 219], and the State offered $1.50 sf for the land. It justified this low offer by blaming the impairment on the Borough. The State only agreed to pay for a single tract of unimproved land [p.230]. The State simply ignored the fact that our land was fully improved [p.133, 177, 241] and consisted of at least 4 lots on the date of taking [p.245].

We filed an inverse condemnation claim. Judge Blair found that the property was taken sometime between 1983-85 [p. 37, 52],

based on business interference and our being singled out to pay a disproportionate share of a public project. He left the issue of proportionate liability as between the State and the Borough for the trial. After having merged the cases, the parties stipulated to bifurcate the issues of decreases and damages to a second trial. All issues dealing with our developing the area were specifically preserved and removed from the case for future litigation. The agreement was reduced to a court order [p.42]. We therefore did not object when the State chose to treat the land as a single tract of unimproved land during the first trial [p.48], because the outcome was only relevant to the Borough's exposure to liability. For the first trial the land was appraised as it was on the date of taking, impaired but absent improvements [p.43-45, 47, 48, 49, 233, 236]. Our experts referred to the property as a hypothetical subdivision, as a pile of lumber is a hypothetical house. Not treating the property as subdivided in 1983 was a condition for having a second trial [p.43-4, 47]. The jury adopted the State's proposal to the penny [p.52]. ***The jury did not know that the property was actually improved and subdivided***. We did not appeal the first trial, as we agreed with the outcome; the land was impaired in 1986, and the remaining issues were preserved and would be litigated in the upcoming trial. We spent a year preparing for the second trial and there were no question as to what issues remained to be litigated in the second trial [p.243]. Both sides prepared appraisals and all experts were deposed.

Judge Blair retired. Judge Steinkruger, on her first case on the bench, erroneously dismissed the whole case on alleged failure to appeal the Platting Board. The Alaska Supreme Court reversed. The Court also made several factual findings, *sua sponte*, but without the benefit of knowing the facts. It concluded the following: 1. **There were only 3 letters of interference**. In fact, there were several including memos and meetings [117-28, 141]. 2) **We did not appeal**. We did not disagree that the impaired raw land absent improvements, was worth $1.79 sf in April 1986. 3) **Ehrlander asked for decreases in value**. We did not ask for the value attributed to the property being subdivided into 4 or 15 lots or for value attributed to its being fully improved. We spent $350,000 on improving the area and these fixed improvement attributes have not been litigated. The State used several of our cost figures to specifically remove the development costs, which we had already paid, from the first trial [p.45, 48, 49]. 4) **The State made no clear effort to minimize condemnation cost**. Several DOT officers testified in their depositions that cost savings was a factor [p.243]. The Alaska Supreme Court did not know this, because it ruled before the full record was developed, and because the only issue on appeal was the exhaustion issue. 5. **No bad State conduct**. State officers have admitted to inappropriate conduct. Judge Blair found interference with our development. Federal regulation 49 CFR Sec. 24.103 (b) and AS 34.60.120 (3) provide for excluding decreases. This shredding of

property rights was on motion for summary judgment, and we were the non moving party. 6. **No facts of State's liability for Borough denial**. The Borough did highway planning under contract for the State, as an agent. The State also actively participated in the planning and instructed the Borough on what to do. It is important to recognize that compensation for damages does not depend on the Borough's or the State's wrongful actions. This right comes from the Alaska Constitution which includes "damaged" in its just compensation clause. This case involved a formal taking. 7) **DOT did not urge for disapproval**. The State wrote several letters and refused to rescind its request for phased development. My claims are not dependent on bad intentions [p.117, 121]. 8) **Ehrlander had no objection to note**. I had no choice if I wanted anything approved. 9) **The Borough had already decided for phase development**. The State requested, in a letter, that the Borough deny part of our subdivision, right before the case was going up to the Planning Commission on appeal. I requested that the DOT, rescind its request, but it refused. In her deposition Ms. Janice Wagner, DOT, said that DOT intended for the Borough to follow its recommendations [p.121]. 10) **On September 14, 1983 DOT's position was neutral**. [p.243] DOT deceptively used a dual process [p.117]. Officially they always checked off the no objection box while they wrote their objections below or on a separate paper. Besides, it is not relevant. The only relevant factor is whether decreases were

caused by the pendency of the highway, and if so, they must be ***excluded***, not ignored.

The Alaska Supreme Court reversed the dismissal [p. 54] and waived *Klopping* damages because of our allegedly not having raised the issues in the lower court [p.62], even though exhausting remedies was the only issue on appeal. Further, the Blair Court's taking was based on a *Klopping* scenario, our Bifurcation Agreement contained the issues, and the issues arrived from the Constitution [p. 212] and statutes [p. 213, 217]. The Court ruled that *"it was not clear"* [p.63] that there was enough State interference, and therefore it dismissed liability against the State on summary judgment, including the bifurcated issues that had nothing to do with an inverse taking. The Court provided that if we could establish a *Lange* taking based on a 4 element test [p.63-4], we could have interest as damages from the new date of taking, but not the actual value [p.75]. We were faced with a situation where we had bifurcated the major elements of the bundle of property rights to a second trial, but the Alaska Supreme Court vaporized these vested rights without giving us an opportunity to litigate the issues before a real finder of facts [p.74-5, 156-9]. The State had taken 4 [p.245] or 15 [p.242] subdivided and improved city lots, and we had been compensated for only the impaired value of a single tract of raw land [p.48, 230, 233, 236]. The Court simply ignored the halfway implemented Bifurcation Agreement [p.42], a federally vested property right.

On 2-5-91 Judge Steinkruger permitted amendment of our complaint to include *Klopping* damages [p.72], providing another recourse to litigate damages and decreases guaranteed in the Bifurcation Agreement, AS 34.60.120 (3), A.C. Section 18, and 49 CFR Sec. 24.103. Judge Steinkruger's decision was reversed on Petition for Review on 7-24-91 [p.74]. The Alaska Supreme Court ruled that decreases should not be included in a condemnation appraisal [p.74], but left no recourse to correct this injustice. It appears that the Supreme Court, like the trial court, misinterpreted this statute to mean that decreases should be ignored rather than ***excluded***. This issue has been addressed by many courts, and the Alaska Supreme Court's ruling on this matter contradicts all past rulings including those by this Court. The Court ruled that just compensation had been determined in the first trial [p.74] and that it would be improper to reopen the issue of value. The Court simply ignored that the current issues had been bifurcated away from that trial [p.243]. The Court emphasized that only the *Lange* issues could be considered in the pending trial. A new value could be determined but only for the purpose of determining interest damages [p.75]. The Court did not explain why it did not provide for damages that were preserved in the Bifurcation Agreement and are secured by AC Sec. 18. Nor did it explain why it did not allow for compensation for decreases or why it did not enforce the stipulation agreement. These are not rights that can be arbitrarily shredded. On 2-2-93, Judge Steinkruger found a *Lange*

taking, that the State took the property on 9-14-84 [p.113], based on business interference, as Judge Blair previously had found. The court also found that the property was subdivided and improved at the time of taking, and it was comparable to the adjacent property that sold for $4.50 sf in 1984 [116(7), 117(9), 133(40), 141]. Judge Steinkruger found that highest and best use was as a residential subdivision [p.115(5)].

Because of the Alaska Supreme Court's holding, that the value issues belonged in the first trial [p.74], and the fact that we still had no forum for the bifurcated issues, we asked Judge Steinkruger for leave to litigate the bifurcated issues in the first trial case, case 886, [p.82] or to merge the issues with the pending *"Lange"* case 2287. The court held that our motion was frivolous, and we were fined $2,000. The ruling was upheld by the Alaska Supreme Court on 7-6-94 [p.151]. It ruled: 1) **that we argued a $4.50-$4.95 value at the first trial**. [p.152] The Court did not recognize that it is not the value argued that matters, it is the right to inform the jury of <u>what</u> they are appraising that is important. If the jury does not know <u>what</u> they are appraising, that the property is subdivided and improved, the value we argue is irrelevant. 2) **Our attorney (in the first trial) told the court that we only planned to ask for interest damages in the second trial**. [p.153] Judge Blair had given us the choice of using either the formal or the inverse date of taking for the date of value. If we received a reasonable value in the first trial, we planned to accept that value. We did not knew that the

State would not adhere to statutory appraisal provisions and how that would affect the outcome of the first trial. My attorney's statement did not concern the Bifurcation Agreement and was not intended to relinquish property rights. We have never intentionally waived the right to receive the value for the highest and best use on the date of taking and compensation for damages and decreases. This statement was made at the outset of the trial when the judge was explaining the law of the case [p.44, 43-9]. 3) **The $2,000 frivolous motion fine was not excessive.** After having been singled out to pay a disproportionate share of this public project and having had to subsidize this project with over $2,000,000.00, when the State took our property for less than our cost, for substantially below the market value, and less than we owed our bank, eventually making us subject to a judicial foreclosure, it seems excessive to us. I only sought a forum to litigate constitutional property rights that had been taken absent compensation or due process.

I decided to initiate federal litigation addressing the State's abuse of due process or the absence of a state post-trial process, Constitutional violations and civil rights violations. I soon learned that I first had to raise all issues in a state court. There were several post trial issues that had not been raised previously including the breach of contract of the partially implemented Bifurcation Agreement and failure to build a frontage road.

I initiated a new state case, 4FA-95-870CI, on post trial issues including the *Klopping* issues that had been unintentionally waived from previous litigation [p.77] and the bifurcated issues. *Klopping* damages, the Bifurcation Agreement, AS 34.60.120(3), and 49 CFR Sec. 24.103 95,b) are overlapping issues. I also included Mr. John Athens as a party in his personal and official capacities for orchestrating and enforcing the department's illegal policy of taking property for as little as possible, for ignoring statutory provisions, for habitually misrepresenting facts to the courts, and for reneging on the fraudulent Bifurcation Agreement which was breached after it was too late to appeal the first trial.

Ironically, Judge Savell dismissed most issues on *res judicata* [p.175]. He dismissed the civil rights violations on immunity or time bar. I am in the process of appealing that case. The outcome is predictable; the Alaska Supreme Court will simply find that we have not been damaged, as it has three times in the past, stating that just compensation was determined by the jury in the first trial [p.159]. Until this Court finds that, based on federal standards, compensation for only one small part of the bundle of vested property rights does not constitute just compensation for those elements that were bifurcated to a separate trial, I will have no state recourse. Further, if this Court should rule that we are entitled to the fair market value for the property based on its highest and best use on the actual date it was taken [p.48,

115] and absent impairments attributed to the highway project, then all other litigation will become moot.

On 7-31-96 the Alaska Supreme Court upheld Judge Steinkruger's 1993 ruling [p.158]. It held that we may not have subdivided value because we did not appeal the first trial [p.159]. I filed for a rehearing [p.222], explaining that the subdivision issues, decreases and damages were not part of that first trial. It would have been impossible to appeal the 9-14-84 taking in 1986 when the 1984 taking was not found until 2-3-93. Our motion for rehearing was denied on 8-13-96. We now faced a situation wherein our 4 or 15 city lots were taken on 9-14-84, before they became impaired by the highway blight, together with $350,000 worth of fixed improvements [p.141, 177] and the value attributed to those improvements. Yet, we have only been compensated for the blighted 1986 value, absent improvements and subdivided value [p.48, 78, 99, 230, 233, 236], severance damages and interest on the impaired 1986 value. This is not a disagreement with the jury verdict as the State would have it. The fact is that we have not been paid for what the State took. It is a matter of whether we are entitled to compensation for the highest and best use on the date of taking including the fixed improvements as provided by federal regulations 49 CFR Sec. 24.103. The state's in-house appraiser, Mr. Glen Potts, provided the $4.50 sf value in 1984 for improved property (Judge Savell apparently confused this appraisal with the $1.79 sf State

appraisal prepared by Mr. Hoagland which was used during trial [p.181]). The State had removed Mr. Potts' appraisal from the State records offered for our inspection. Our property was improved, and we have the right to that value and to be compensated for the fixed improvements, the unimpaired value, and business damages.

On 7-29-96, I asked Judge Steinkruger to issue a final judgment in the first trial so I could appeal the case [p.173]. That case has been misleadingly labeled "the formal trial (4FA-86-886)," when in reality the bifurcated trial more resembled a formal trial. There was a final judgment on the jury verdict, but not on the case as a whole, after attorney fees and other motions had been decided. The bifurcated issues originated from that case, and having failed to find a forum to litigate those issues or the other post trial issues, I asked the court for that opportunity or to remerge the 886 case with the 2287 "inverse" case. This request was denied on 8-26-96 [p.173].

I asked the Alaska Supreme Court, in several motions, for leave to raise the remaining issues in the *"Lange* case." Each request was denied [p.156-7] including the attempt to raise the issues in the "first trial" 886 case. The Alaska Supreme Curt has ruled clearly on all major issues and this case is ripe for review by this Court [p.54, 74, 151, 156, 157, 158].

State officers, directed by Mr. Athens, deprived our family of Constitutional civil rights, under the color of state law: 1) by

fraudulently misstating what property rights the state actually took [p. 48, 49, 230, 246]; 2) by telling the court that we did not operate a business on the premises [p.100] and that the property was not subdivided or improved [p.95]; 3) by giving an erroneous legal description of the property [p.246]; 4) by engaging in a Bifurcation Agreement scam to remove vested property rights from the first trial, and after benefiting from partial implementation, breaching this bilateral contract after it was too late to appeal the first trial [p.42, 233, 236]; 5) by ignoring or violating several state and federal statutory appraisal and condemnation provisions [p.212-21]

RAISING THE FEDERAL QUESTIONS IN THE STATE COURTS, THE METHOD OF RAISING THEM, AND HOW THEY WERE PASSED ON BY THE COURTS

(1) The Constitutional violation issues, the State's interfering with our development, and the issues of decreases and damages were raised in the lower court in our Complaint on 10-16-86. (2) Juge Blair considered the 5th Amendment of the federal Constitution in his 10-7-87 Opinion [p.37]. (3) We raised the federal issues to the lower court in our August 1987 Memorandum of Points and Authorities. (4) We raised the federal issues in our 8-11-87 Opposition to Motion to Dismiss. (5) We raised the federal issues in our 9-22-88 Cross Motion for Summary Judgment on Liability. (6) We raised the federal issues in our 7-1-88 Plaintiff's Opposition to State's Motion for Summary Judgment. (7) We raised the issues in our 3-1-91 amended Complaint.

(8) We raised the federal issues in our 11-19-91 Superseding Mem. in Supp. of Plaintiff's Motion for Summary Judgment. (9) We raised the federal issues in our 12-9-91 Mem. in Support of Motion for Relief from Judgment. (10) We raised the issues in our 12-11-91 Mem. in Support of Opp. to the State's Motion for Sum. Judgmt. (11) We raised the issues in our 1-31-92 Reply to the State's Opp. to Plaintiff's Mot. for Sum. Judgm. (12) We raised the federal issues in our 2-6-92, Reply to the State's Opp. to Ehrlander's Motion for relief from Judgmt. (13) We raised the federal issues in our 4-10-95 Complaint in the 4FA-95-870 case and in several motions in that case. (14) We raised the federal issues in our 4-24-95 (case 2287) Motion for Sum. Judgmt. etc. (15) We raised the issues in our 1-25-96 (870 case) Points on Appeal (16) We raised the federal issues in our 4-18-96 Federal Complaint. (17) We raised the issues in (886 case) our 8-27-96 Motion for Leave to litigate the inverse taking of improvements and a breach of contract. (18) We raised the federal issues in our 8-30-96 Opposition etc. in the 886 case.

1. The Blair Court found an inverse taking based on paying a disproportionate share of a public project and business interference.

2. The Steinkruger Court favored a *Klopping* taking [p.77, 111-2], but was restricted by the Alaska Supreme Court to finding a modified version of a *Lange* taking based on business interference. She found a *Lange* taking on 9-14-84. Damages were limited to interest on the 1986 impaired value, absent improvements.

3. The Savell Court dismissed all issues based on *res judicata*, immunity, or time bar.

4. The federal Singleton Court dismissed all issues on *res judicata* and the Eleventh Amendment.

The federal issues were raised to the Alaska Supreme Court in the following documents. (1) They were first raised in our 9-25-89, Merit Appeal from the 11-16-88 Final Judgment of Judge Steinkruger, Appellant's Reply Brief [case S-3129 (2287 & 886]. The issues were ignored by the Court. See *Ehrlander v. State of Alaska DOT*. 797 P2d 629 (Alaska 1990). (2) The federal issues were raised in our 4-8-91 response and cross petition to the State's Petition for Review. The Alaska Supreme Court, in its 7-3-91 Order, ruled that decreases attributed to the highway must be disregarded. It was unclear if the Court meant removed from the appraisal or ignored. Regardless, it provided no remedy. The Court ruled that the value found (for a single tract of raw impaired land in 1986, absent improvements) in the first trial constituted just compensation (for 4 or 15 unimpaired subdivided and improved city lots [in 1984]). We could not have damages. The issue of a new value for interest damages was left open. (3) The federal issues were raised in our 8-5-91 Motion for Rehearing. (4) The federal issues were raised in our 11-19-92 Appeal [case 886] from Judge Steinkruger, Appellant's Opening Brief, and in the 5-17-93 Reply Brief. The Alaska Supreme Court, in its 7-6-94 Judgment, focused on our asking for $4.50

sf rather than on what the jury was appraising. It dismissed most issues based on a statement from my attorney taken out of context. It held the motion to be untimely and frivolous. (5) The federal issues were raised in our 3-3-95 Appellee's Brief response to the State's appeal of Judge Steinkruger's [case 2287] *"Lange* taking" ruling. The Alaska Supreme Court simply ignored the federal Constitutional issues. See 7-31-96 Judgment. (6) The federal issues were raised in our 3-28-95 Cross-Appellant's Opening Brief [*"Lange"* case 2287] and they were raised strongly in our 5-30-95 Reply Brief. The Supreme Court ignored the issues. See 7-31-96, Judgment. (7) The federal issues were raised in our 10-11-95 Brief of Appellee [case 2287 cost appeal]. The Court ignored the issues. (8) The federal issues were raised in several motions to the Alaska Supreme Court during the case 2287 appeal. Our motions were all denied without the Court's providing a reason. (9) The federal issues were raised in our 8-5-96 Brief of Appellant [case 4FA-95-870]. This appeal is in process.

The Alaska Supreme Court has simply ignored the bifurcation agreement. It has held that just compensation was determined by the jury in the first trial, and because we did not appeal that verdict, we cannot receive compensation for the improvements, the enhanced value attributed to the improvements, or to the property's having been subdivided into 4 or 15 lots. We cannot have the value on the date of inverse taking, compensation for the decreases attributed to

the pendency of the highway project, or business damages. The Court has not yet ruled on the civil rights violations in the 870 case, however, it has refused to merge the cases. If this Court permits just compensation in the pending case, all other litigation will be moot as we will no longer have been damaged.

ARGUMENT

Reasons for granting a Writ of Certiorari.

1. A state court of last resort has decided on an important federal question in a way that conflicts with the decision with another state court of last resort or of a United States court of appeals.

2. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

All of the above reasons apply to our case, particularly #2.

Q. 1) ABUSE OF DUE PROCESS:

[a, b] The Alaska Supreme Court's reversal the trial court's factual findings, without the benefit of the facts, and its reversal of the trial court's leave to amend our complaint are violations of federal due process and contrary to the law of the land. The Court reversed factual findings by the Blair Court because some issues were "not clear." This was on a Motion for Summary Judgment which should have been viewed in the light most favorable to us, the non moving party, and the facts should have been held to be true. At the time of the Summary

Judgment ruling, there were several depositions under way that would have provided a full factual record. The Alaska Supreme Court's taking on the role of fact finder prevented our having an opportunity to explain evidence and develop a full factual record. The limited format of an appeal does not provide that process. [c] We have the right to have a jury decide whether property rights were taken absent just compensation, or alternatively, whether the State and its officers violated our civil rights, whether there was unreasonable delay, or whether the State influenced the Borough to deny our development. Whether there were business damages or decreases caused by the highway project are jury issues and not factual issues to be decided by the Alaska Supreme Court on appeal from summary judgment. The Court's *sua sponte* ruling was contrary to the facts [p. 114, 116, 117, 121, 141, 142]. Yet, it became the law of the case and related cases, and subject to *res judicata*. The premature rulings placed the Constitutional provisions in the background, and *due process* was replaced by *court rules*. [d, e] The bifurcated property rights vaporized, and constitutional issues were waived by the Court on our behalf. A constitutional right shall not be waived unintentionally. ***Meder v. Safeway Stores, Inc.*** 159 Cal. Rptr 609 (Cal 1979), ***Foster v State*** 259 P2d 542, ***Milwaukee & Sub. Trans. v. Milwaukee City***. 263 NW2d 503 (Wis. 1978). The lower court has discretionary right to permit amendment of our complaint. It did, and it created a vested property right that should not have been

taken absent just compensation, which is what occurred when the right was arbitrarily reversed by the Alaska Supreme Court. Clearly both Judge Blair and Judge Steinkruger are as reasonable people as are the members of the Alaska Supreme Court. If reasonable people can differ, the trial courts' rulings should not have been reversed without a hearing on the issues, particularly when the Alaska Supreme Court did not know the facts. ***Parratt v. Taylor*** 451 US 524 (1981). The Due Process Clause guarantee "to all individuals [of] a meaningful opportunity to be heard. 401 US 379 ***Logan v. Zimmerman Brush Co*** 455 US 422 (1982), ***JB v. Washington County*** 905 F Supp 907 (D.Utah 1995), ***Sheerbonnet, Ltd. v. American Express Bank LTD*** 905 F Supp 127 (S.D.N.Y. 1995).

> The hearing required by the due process clause of the Fourteenth Amendment must be meaningful and appropriate. . . . It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard. ***Bell v. Burson*** 402 US 535 (1971). The constitutional requirement (of a hearing before deprivation of a property right) does not depend upon any narrow balancing process. ***Roberts v. New York*** 295 US 264 (1934), ***Board of Regents v. Roth*** 408 US 564 (1972).

Q. 2) WHETHER ADHERING TO LAWS IS OPTIONAL

The Fourteenth Amendment provisions are clear federal mandates not subject to sovereign immunity. Otherwise, the Fourteenth Amendment would have no meaning.

a) ***Inverse taking of property rights***. The Alaska Supreme Court's denial of compensation for the $350,000 worth of fixed improvements that

our business (Unique Builders) had completed in the take area and the enhanced value attributed to those improvements, as well as from the property's having been subdivided city lots, is unprecedented, contrary to the law and to every other state or circuit court's ruling. Moreover, it is contrary to the rulings of this Court. Further, the State's failure to build the frontage road to which it committed in the taking documents, leaving some lots landlocked after the taking, was an additional compensable taking of property rights. ***State v. Glen*** 602, P2d 253 (Or. 1979), ***State v. Lewis*** 785 P2d 24 (AK 1990).

b) ***Federal minimum standard laws.***

The Fifth Amendment provides for due process and just compensation. The standards set by this Court have been ignored by the Alaska Supreme Court. Taking property rights absent a hearing on the issues and not paying for fixed improvements does not reach that standard. The State can adopt its own Constitution and statutes, but they may not fall below the federal standards. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987), ***United States v. Virginia E.&P. Co.*** 365 US 624 (1961), ***Kirby Forest Industries, Inc. v. United States*** 467 US 1 (1984), ***United States v Twin City Power Co.*** 350 US 222 (1955), ***Parratt v. Taylor*** 451 US 524 (1981), ***Ruckelshous v. Monsanto Co.*** 467 US 986 (1984).

The Seventh Amendment provides for a jury's deciding factual issues. The Alaska Supreme Court did not have the right to deny

a jury trial on all factual issues. ***Burlington Northern v Nebraska Public Power Dist.*** 931 F Supp 1470 (D.Neb. 1996), ***United States v Gaudin*** 132 L Ed 2d 444 (1995). For opposing view, ***Wilson v. Jones*** 902 F Supp 673 (E.D.Va 1995).

The Eighth Amendment provides for no excessive fines or cruel and unusual punishment. Taking vested property rights absent just compensation, destroying our business, singling out our family to pay a disproportionate share ($2 million) of a public project, and taking our property for less than our cost -- less than we owed the bank, making us subject to a judicial foreclosure, all because we did not appeal the 886 case [p.159], even though the relevant issues had been preserved in a Bifurcation Order for litigation in a future trial, is an excessive fine and cruel and unusual punishment. (No rulings on the issue)

The Thirteenth Amendment provides for no involuntary servitude. We have never intentionally waived our rights to just compensation. Being singled out to pay a disproportionate share of a public project violates this Amendment. (No rulings on the issue)

The Fourteenth Amendment provides for due process of law when taking private property and for equal protection of the laws. The Alaska Supreme Court's taking on the role of fact finder, absent a hearing on the shredded property rights, violated this Amendment. Singling out our family to pay more than our fair share of the highway project violates this Amendment. ***Parratt v. Taylor*** 451 US 524 (1981),

Logan v. Zimmerman Brush Co 455 US 422 (1982), ***Bell v. Burson*** 402 US 535 (1971), ***Roberts v. New York*** 295 US 264 (1934), ***Board of Regents v. Roth*** 408 US 564 (1972).

c) ***The State's ignoring laws***.

The Alaska Supreme Court must adhere to state and federal laws. In our case all condemnation laws were ignored:

1. *The highest and best use*. The Alaska Supreme Court's denial of compensation based on the highest and best use for which the property was suitable on the date of taking, contradicts the law of the land. Judge Blair and Judge Steinkruger both found the highest and best use to be as subdivided lots [48, 115(5)]. Yet, we were only compensated for a single tract of unimproved raw land [p.99, 230]. ***Carl R. Lange v. State of Washington*** 547 P2d 282 (Wash. 1976).

2. *Development profit*. The Steinkruger Court denied "development profit" [p.101] based on the erroneous belief that it was not available in Alaska. The only issue should be the fair market value on the date of taking. If our business created that value or if it arrived from some other factor should be irrelevant [See post 3]. The State should not have deducted for an imaginary developer and for items completed and paid in full. ***State v. Terrace Land Co. Inc.*** 298 So2d 859 (Loui. 1974), ***US v. Virginia E & P. Co.*** 365 US 624 (1961).

3. *Fair market value on date of taking*. The Alaska Supreme Court's denial of compensation for the fair market value on the date the

property was actually taken, before it became impaired by the pendency of the highway project, violates AS 34.60.120(3) and 49 CFR Sec. 24.103(b). It ignores those issues' having been preserved for future litigation in a partially implemented Bifurcation Agreement. This is contrary to the law of the land. Further, the Alaska Supreme Court adopted the *Lange* taking scenario from the Washington Court but it ignored the most important aspect, that of moving back the date of value to a time before the property became impaired by the highway project [p.98, 102]. This concept is echoed by a multitude of Courts. ***Carl R. Lange v. State of Wash.*** 547 P2d 282 (Wash 1976), ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987), ***United States v. Twin City Power Co.*** 350 US 222 (1955).

> Just compensation, as required by the Fifth Amendment, means the value of what is taken at the very time it is taken and to the person from whom taken. ***Kirby Forest Industries, Inc. v. United States,*** 467 US 1 (1984).

4. *Neither AS 34.60.120 (3) [p.217] or 49 CFR Sec. 24.103 (b)[p.220] are written clearly.* These statutes could be interpreted to read the opposite of their true meaning. They provide that decreases caused by the highway project "shall not be considered" and "appraiser should disregard any decrease" This could mean that decreases should be ignored, as the State will have it, or, as intended, that impairments attributed to the highway should be determined and excluded. Property owner should be placed in the same position as before take. State must

pay full compensation. *Don't consider the project's diminishing effects.* ***Carl R. Lange v. State of Wash.*** 547 P2d 282 (Wash 1976). Condemnee must be offered an opportunity to demonstrate whether the pendency of the highway project had impaired the property so these decreases could be excluded. The property should be valued as if there were no highway project planned. ***Klopping v Cit. of Wittier*** 500 P2d 1345 Cal 1972.

> Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat ... [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. ***United States v Virginia E. & P. Co.*** 365 US 624 (1961).

The framers intended for decreases to be excluded, not disregarded as held by the Alaska Supreme Court.

5. <u>*Damages*</u> The Alaska Supreme Court erred in denying compensation for damages to our business that was located on the premises and to our investment backed housing project. The addition of the word "damaged" to our Constitution [p.212] made compensation for damages a federal vested property right. Nor should our business or our investment backed project have been taken absent just compensation. The stipulated agreement estops the State from now opposing damages and decreases. ***F.Giannini v. First National Bank of De Plains*** 483 NE 2d 924 (Ill. App. 1985).

> Pretrial stipulation has the effect of amending the complaint. ***Lake Havasu Com. Hosp v. Ariz Title Ins*** 687 P2d 371 (Ariz App 1984).
>
> Stipulation does not evaporate with new counsel. Stipulation will stand; when one reaped the benefits one cannot deny stipulation. ***Marden v. Intern. Ass'n of Machinist ETC.*** 576 F2d 576 (1978).
>
> [O]ral contract with respect to interest in land may become enforceable, in spite of statute of frauds, where there has been part performance. ***Pedring v. Chun*** 906 F.Supp. 1377 (D.Hawaii 1995).
>
> The "just compensation" provision in the Fifth Amendment is designed to bar government from forcing some people alone to bear a public burdens which, in all fairness and justice, should be borne by the public as a whole. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987).

6. *Full attorney fees and costs*. They are provided in Rule 72 and necessary for full compensation, and they should have been provided.

Q. 3) THE STATE'S FIDUCIARY CAPACITY.

A.C. Sec. 7, provides for "fair and just treatment" when the State deals with its citizens. The State has violated this right. While there is no set formula for determining when justice and fairness require that economic injuries caused by a public action must be deemed a compensable taking, and the inquiry into whether a taking has occurred is essentially an ad hoc, factual inquiry, several factors should be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking, among which are the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. ***Ruckelshaus v.***

Monsanto Co. 467 US 986 (1984), ***Howard v. Grinage*** 82 F3d 1343 (6th Cir. 1996), ***State v. Waggoner*** 319 S.W.2d 930 (Mis. 1959), ***City of Los Angeles v. Decker*** 558 P2d 545 (Cal. 1977).

Q. 4) CONSTITUTIONAL/ CIVIL RIGHTS VIOLATIONS.

Permitting the State's entering into a Bifurcation Agreement to remove vested property rights from the first trial for future litigation, and then to breach this bilateral contract after partial implementation is contrary to the law of the land. So is the State's and its officers' habitually misrepresenting to the courts what property rights were taken, enforcing an illegal department policy to take property for as little as possible, regardless of applicable laws. ***Ketron v. Chattanooga - Hamilton County Hosp.*** 919 F Supp 280 (E.D.Tenn. 1996), ***Hafer v. Melo*** 502 US 21 (1991), ***Stevens v. McHan*** 3 F3d 1204 (8th Cir. 1993), ***Valdez v City of New London*** 903 F Supp 286 (D.Conn. 1995), ***Pruneyard Shopping Center v. Robins*** 447 US 74 (1980), ***Roberts v. City of Forest Acres*** 902 F Supp 662 (D.S.C. 1995), ***Sanfilippo v. County of Santa Cruz*** 415 F.Supp 1340 (N.D.Cal. 1976).

> . . . whether breach affects interest sufficiently grave to trigger due process scrutiny; court must look to effect of breach on claimant and determine whether effect is so dramatic and rights implicated so fundamental that Constitution provides remedy. ***Irwin v. City of New York*** 902 F Supp 442 (S.D.N.Y. 1995).
>
> Taking -- Result. It does not matter how it was done, technical label, it is the result that matters. ***Hughes v. Washington*** 389 US 290, 298 (1967)

> Insofar as 42 USCS Sec. 1983 affords a civil remedy for deprivations of federally protected rights by persons acting under color of state law without any express requirement of a particular state of mind, the initial inquiry in any Sec. 1983 action must focus on whether two essential elements to a Sec. 1983 action are present, that is, whether the conduct complained of was committed by a person acting under color of state law, and whether this conduct deprived the person of rights, privileges, or immunities secured by the Constitution or laws of the United States. ***Parratt v. Taylor*** 451 US 524 (1981).

Singling out our family to subsidize this highway project with our working capital and savings by paying less than our cost for the property and less than what we owed to the bank, making our family subject to a judicial foreclosure, making us substantially poorer, violated the Alaska Constitution that provides for damage compensation. A Constitutional violation is self-executing. [W]here a plaintiff's claim had been dismissed for failure to comply with a trial court's order -- the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." ***Parratt v. Taylor*** 451 US 524 (1981), ***Carter v. Carter Coal Co.*** 298 US 342 (1935), ***First Ev. Chur. Glendale v. LA*** 482 US 304 (1987), ***Defeo v. Sill*** 810 F Supp 648 (ED. PA. 1993), ***Irwin v. City of New York*** 922 F Supp 442 (S.D.N.Y. 1955).

DATED this 15th day of October, 1996 at Fairbanks, Alaska.

By: Lars W Ehrlander

Lars W. Ehrlander, *pro se*

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DIRECTORY OF APPENDICES

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OPINIONS, ORDERS, FINDINGS OF FACTS AND CONCLUSIONS OF LAW

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

State of Alaska, Plaintiff,
vs.
6.313 acres, more or less; Lars W. Ehrlander, et al, defendants.

Case No. 4FA-86-886 Civil
(Consolidated with Case No. 4FA-86-2287 Civil)

Dated: Oct. 7, 1987
Judge James R. Blair

OPINION

The State of Alaska moves for dismissal on the issue of its liability for an alleged taking of Ehrlander's property. The State argues four general points: 1) no "taking" occurred from FNSB's failure to approve Ehrlander's subdivision proposal; 2) a claim for damages is the incorrect remedy for a regulatory taking; 3) Ehrlander failed to exhaust his administrative remedies so cannot allege a taking; and 4) even if a taking did occur, the FNSB is liable, not the State, because the FNSB had the sole power to approve Ehrlander's plan. Ehrlander moves for summary judgment as to his right to damages for a temporary taking and as to the State's liability.

Lars Ehrlander is the owner of a parcel of land in Fairbanks now known as the Royal Court Village (RC) Subdivision. In the summer of 1983 Ehrlander submitted an application to subdivide

the parcel to the FNSB Platting Board. The Board held a hearing on the proposed RC Subdivision August 24, 1983. The Board approved an amended form of the proposed plan, but would not permit development of the southern half of the parcel because the area was a possible location of a State highway project known as the Geist Road Extension. On September 14, 1983, the Board recommended and upheld its decision at an open meeting.

The final decision on the location of the Geist Extension was made by the FNSB Assembly April 12, 1984. In 1985 the FNSB allowed Ehrlander to subdivide a portion of the southern parcel known as Royal Court Village Subdivision, First Addition [RC1), which had been frozen pending determination of the State's right of way.

In 1986 the State sued to condemn the remaining portion of Ehrlander's property needed for the Geist Extension. Ehrlander counter claimed for the loss of the use of RC1 between 1983 and 1985, praying for money damages for inverse condemnation and naming both FNSB and the State as defendants.

1. Ehrlander had sued the State and FNSB earlier for inverse condemnation of both RC1 and the property condemned by the State, alleging that a taking occurred when the Board disapproved the subdivision plan That case, 4FA-86-2287 Civil, is now consolidated with this case.

The current motions before the court concern Ehrlander's loss of the use of RC1 and the condemned portion of his property between 1983 and 1985.

I. TAKING

Ehrlander alleges that a temporary taking of his property occurred between 1983 and 1985, because FNSB was waiting for the State to decide on a route for the Geist Extension. Ehrlander has alleged a loss of all economically viable use of his property and brings his claim under the Alaska Constitution.

Taking law under the Alaska Constitution is more liberal than U.S. taking law. *State v. Doyle*, 735 P.2d 733, 736 (Alaska 1987) (the inclusion of the term "damage" in the Alaska Constitution affords the property owner broader protection than that conferred by the U.S. Constitution). Once an owner is deprived of the economic advantages of legal ownership, a taking has occurred. *Grant v. State*, 560 P2d 36, 39 (Alaska 1977). Such owners are entitled to compensation for reduction in value of the property. *Alsop v. State*, 586 P2d 1236, 1238 (Alaska 1978).

The loss of economic advantage or reduction in value of Ehrlander's property occurred through an administrative decision to delay approval of Ehrlander's development plan. Ehrlander was forced to pay more than his share for a pubic benefit; therefore,

compensation is appropriate. Ehrlander's claim is valid for "damage" to his property under the Alaska Constitution.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

When Ehrlander's application to subdivide RC was denied by the Platting Board, Ehrlander's had a right to de novo review by the Planning Commission. FNSB Code Ord. Sec. 17.18.020. Ehrlander did not so appeal.

The State argues that absent the appeal, the Platting Board decision is not final and that Ehrlander forfeited his right to make his present claim for inverse condemnation. However, even if an appeal had been successful, there would have been a period of time in which Ehrlander incurred compensable damages because of the limitations on the use of his property. Ehrlander's failure to appeal was at most a failure to mitigate his damages and does not preclude him from making a claim for damages.

For purposes of summary judgment regarding the taking claim, an exhaustion requirement should not totally preclude Ehrlander's claim. This is a prima facie taking case. The decision to apply the exhaustion requirement is discretionary; the court will view the facts of each case and balance the litigant's interests against the agency's interests. *Aleknagik Natives Ltd. v. Andrus*, 648 F2d 496, 499

(9th Cir. 1980). The balance here favors a denial of the motion to dismiss Ehrlander's claim on summary judgment.

The State's motion to dismiss is denied. Ehrlander's motion for summary judgment on the issue of whether a taking occurred when the Platting Board denial his subdivision application is granted. The amount of compensation owed Ehrlander, if any, and the responsibility for the taking, as between the State and FNSB, are questions of fact to be determined at a later time. Consequently, Ehrlander's motion for summary judgment on the issue of the State's liability is denied.

DATED at Fairbanks, Alaska this 7th day of October 1987.

Signed, James R. Blair, Superior Court Judge.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,

vs.

Fairbanks North Star Borough and State of Alaska, Department of Transportation and Public Facilities, defendants.

Case No: 4FA-86-2287 Civil

and

State of Alaska, plaintiff,

vs.

6.313 acres, more or less, Lars W. Ehrlander, et al, defendants.

Case No. 4FA-86-886

Project No. RS-RRS-M-OOOS(52)

Parcel No. 2OA

Date of Order: November 20, 1987

ORDER

The Court, being fully advised in the premises, and upon stipulation of the parties,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the above-captioned case shall be bifurcated, with the condemnation case, pertaining to the summons and complaint filed on April 29, 1986, being tried during the week of December 7, 1987, and under the appropriate provisions of the existing pretrial order.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the inverse condemnation taking case, with respect to the complaint filed by Lars Ehrlander, shall be reassigned for a trial date subsequent to the condemnation case, and that the issues to be determined in that case shall be the damages and compensation due Ehrlander for that period of time from August 24, 1983 until April 29, 1986, and that the parties shall apply to the court for a new trial date with respect to that inverse condemnation case.

Date: Nov. 20, 1987 Signed, James R. Blair, Superior Court Judge.

Case No. 4FA-86-2287 & 4FA-86-886 Civil.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

State of Alaska, plaintiff,

vs.

6.313 acres, more or less, Lars W. Ehrlander, et al, defendants.
Case No. 4FA-86-886

December 7, 1987 TRIAL on 1986 value. (impaired and absent improvements)

Judge Blair, superior court judge

Mr. Vancil, counsel for the State
Mr. Satterberg, counsel for defendant.
(Mary Ehrlander Direct) *From 1987 trial transcript page 220:*

MR. VANCIL: Your Honor, then could I ask for the most explicit ruling you can give about the degree to which anything relating to the '83 to '85 temporary taking should be excluded, for instance . . .

THE COURT: All I can . . .

MR. VANCIL: . . . any reference to plat . . .

THE COURT: All I can tell you is if the plat's in existence in 1983 and the values are based upon that, then I can't see that there's going to be much of a later trial unless Mr. Ehrlander can show that he could have sold property for much more between 1983 and 1986 . . .

MR. SATTERBERG: Our primary . . .

THE COURT: . . . than he could at the time of the taking. On the other hand if the testimony is, from the appraisers, that had there been a plat in 1983 then the property of 1986 would be X, but since there wasn't a plat in 1983, then the value is Y. Then you got an XY theory for the later trial. But you're still going to be able to -- if the testimony at this trial goes -- which I would think you'd both want to do frankly as far as determining this trial -- if the testimony goes we're going to give you a 1986 valuation, assuming that there was a plat was in existence in

1983, then that resolves all the major issues except whether you could have gotten more money between '83 and '86.

MR. SATTERBERG: Your Honor, basically the inverse case, the areas -- and I don't mind disclosing this to the State, I have informally -- we're looking at other damages which come into play during that case such as additional costs of carrying charges for the loans for example, rental value for the property in that three year period, but we're not asking the State or anybody to pay us fee value from '83 through '86 for that property, we're asking 'em to pay more of a use value for that period of time that the property was locked up. So I think they're exclusive. I think that what we're asking for here is the fee value and of course then there's going to be quite -- we established the fee value in '86, but as far as the damages between '83 and '86 . . .

THE COURT: Well, you know, that depends on what the testimony is. I don't know what it's going to be. If the testimony from the appraisers is that we've got a 1986 value but it'd be more if we'd had a plat in 1983, then you've got another issue to try.

MR. VANCIL: Your Honor, I think the State's entitled to an opportunity to obtain additional evidence on that issue. Right now we've been prohibited by the court order and yet this appraiser has come in and raised what apparently is an interesting solution, yet we don't have an opportunity to provide more than an '86 valuation alone.

MR. EHRLANDER: Can I speak for myself here?

THE COURT: Well, unless you can show that the value in 1983 was more, it's not going to help you.

MR. VANCIL: My understanding of what Mr. Sopp's appraisal is, though, Your Honor, is that he's saying it's worth $1,500,000.00 based upon the assumption that there has not been a freeze of the plat. As I understood your ruling, you were going to permit the State to provide evidence that there was no damage in fact due to the taking involved and accordingly, 1986 values would be cheaper, would they not, to the State than '86 plus '83 temporary taking damages.

MR. SATTERBERG: That's not what we're asking.

MR. VANCIL: That's the way I understand it, Your Honor.

MR. SATTERBERG: That's not what we're asking.

THE COURT: No, all I ever ruled was that we're going to do this case based on the 1986 values.

MR. VANCIL: Yes, Your Honor.

THE COURT: So I don't know what you're saying as to I said something else.

MR. VANCIL: Well, Your Honor, I'm saying that as I understood your order, you were not going to allow us to talk about damages resulting from the 1983 to '85 taking and . . .

THE COURT: That's right and I'm not.

MR. VANCIL: . . . and those damages are presumed not to have occurred in this appraisal, so that if . . .

THE COURT: Well, you're the one that is talking about raising the issue.

MR. VANCIL: I am, Your Honor. That 's precisely it, I believe the appraisal should be stricken because it'd be double recovery in the sense that if Mr. Sopp's award is entered by the jury, that will presume that that land was platted in '83, never lost any value at all until '86 and was available not as one large unit for some potential purchaser in '86, Your Honor, but as 24 lots.

MR. SATTERBERG: Wrong piece. The orange piece.

MR. VANCIL: I'm sorry, 24 lots. The point being is these were not available for sale to individual purchasers and that's what Mr. Ehrlander's complaining about.

MR. SATTERBERG: We're not saying . . .

MR. VANCIL: In 1986.

MR. EHRLANDER: That's not what he's saying at all in his appraisal.

MR. VANCIL: As I understand, Mr. Ehrlander's whole complaint is that the State and Borough's action together prevented him from having those 24 parcels in a saleable . . . .

THE COURT: We're just going around in circles, Mr. Vancil. You say one thing and I tell you how I see it and then you say the same thing

. . . .

MR. VANCIL: I'm sorry, Your Honor.

THE COURT: . . . . and I tell you how I see it.

MR. VANCIL: My only point was that if you see Mr. Sopp's appraisal as a reasonable method to solve the entire case, I'm simply saying that I think that the State should have an opportunity to have its appraisers consider the entire larger parcel involved in the '83 taking, the entire 1983 plat, the same way that Mr. Sopp did.

MR. SATTERBERG: Your Honor, with all respect I think the State appraisers have. They've gone to the subdivision approach and all Mr. Sopp has said is that I'm using this plat as the -- how it would be labeled

. . . .

THE COURT: If Karl Sopp comes in and testifies that the property is worth "X" in 1985, $1,500,000.00 -- or '86, $1,5000,000.00 and that's based upon the fact it should have been zoned or platted in 1983 and Mr. Vancil (sic) walks away with a $1,500,000.00 verdict, that ends any discussion as far as additional damages except the ones that I've already indicated exist.

MR. SATTERBERG: Sure.

THE COURT: From '83 to '86, that is possible sales that could have taken place before '86 that would have been more and possible carrying charges or things of that nature the he's talked about.

MR. VANCIL: My problem, Your Honor, is that the appraisers have different assumptions. The State appraisers do not assume anything other than we have an '86 taking of unimproved property. The consequence of that difference is large.

THE COURT: Well, that's what the jury's here for.

MR. VANCIL: Yes, Your Honor, but what I'm saying is we won't have -- because of the way we've structured our appraisals to conform with your order and because of the latitude Mr. Sopp would be allowed to use the "83 appraisal, we don't have a way of countering that because of the fact that we've instructed our appraisers to consider the land as it was in 1986.

THE COURT: The highest and best use was a subdivision in 1986 and the Borough should have granted a plat to allow that to be used as a subdivision in 1986, which I guess everybody agrees they should have done. . . .

From 1987 trial transcript page 227:

MR. SATTERBERG: We're not going to be asking, Your Honor, for damages between '83 and '86. . . .

From 1987 trial transcript page 259:

MR. VANCIL: Your Honor, I have an objection to this line of questioning.

MR. SATTERBERG: I think we should make . . .

MR. VANCIL: I move to strike the answer.

MR. SATTERBERG: Your Honor, I think the proper procedure here would be a curative instruction to the jury. I think the Court can do that to explain to them that this is in the process of another litigation.

MR. VANCIL: Your Honor, we've already had a curative warning from Mr. Satterberg that this would happen and now we're going to have a curative instruction. We should avoid this matter entirely. That is my objection.

THE COURT: Objection sustained.

BY MR. SATTERBERG: Mr. Ehrlander, without discussing what happened to the southern side of the property, just explain . . .

From 1987 trial transcript page 810 (State's closing arg.):

MR. VANCIL: Thank you, Your Honor. Ladies and gentlemen of the jury, this is a simple case. The most likely buyer of land , of this land, is a purchaser who would subdivide it and sell off the lots. Now the job is yours. You must tell us what you believe a buyer would pay for this property on April 29th, 1986, which is the date of taking in this case, the date of acquisition by the State. That is the price

paid in cash, not an option. The State pays in cash and those are the tune -- the terms you assume.

From page 812:

All of the comments about damages are non-issues. Let's forget about the non-issues and talk about the value of the land which the State is acquiring. If you were buying this land, you'd cut it up in lots and sell it. Just like a side of beef, your butcher would cut it up and sell the steaks one or two at a time. If, however, the butcher pay $5.00 a pound for the side of beef and later sells it for $5.00 a pound, he's going to have a little problem after he pays for his equipment, his employees, his banker from whom he borrowed money , and so on. His beef will be all gone and there will be no money for the butcher.

The subdivision approach which Mr. Hoagland explained to us is similar. You must buy the land at a price that will permit you to cut it up in lots, pay your employees to finish the roads, and salesmen to find buyers, and still make o profit. If you pay $5.00 a square foot and then sell it again for $5.00 a square foot, there's no incentive to go to the trouble. So put yourself in the place of a buyer in April 1986. What would you pay for this land in order to cut it up into lots and sell it at a profit? That's what the subdivision development approach, properly applied, is all about. Mr. Hoagland explained that to you, and how it is properly applied.

You'll be instructed by the Court to view the evidence. That evidence in large part is testimony. Let's review the witnesses. Mr. Ehrlander is the owner, who will receive the compensation which you award. He has a direct interest in the outcome. He has every right to testify about what he believes, but he's not an appraiser, and he's not unbiased. Mr. Nash did a subdivision approach. He also did a comparison approach using undeveloped land. We disagree with some of his conclusions, but his techniques in the first appraisal were correct. We can only speculate as to what caused him to write the second. The date is the same and the facts are the same. Anyone who makes changes of one-half million dollars.....

MR. SATTERBERG: Object, Your Honor.....

MR. VANCIL: .....must be viewed.....

MR. SATTERBERG: .....facts not in evidence.

MR. VANCIL: .....with suspicion.

MR. SATTERBERG: Facts not in evidence.

MR. VANCIL: I believe they are, Your Honor.

THE COURT: Well, it's for the jury to determine whether or not statements of counsel are accurate recitations of what the evidence shows, but -- statements of counsel are not evidence and should not be considered as . . . .

From 1987 trial transcript page 837:

THE COURT: State of Alaska verus Lars Ehrlander, verdict form: "We the jury duly impaneled and sworn to try the above-entitled cause do find that just compensation due the owner of the land is as follows: Market value of property taken of April 29, 1986, $524,000.00; severance damages to the remaining property on April 29, 1986, $147,870.00 . Dated at Fairbanks this 10th day of December, 1987," and signed by the fore person.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
Fairbanks North Star Borough and State of Alaska, Department of Transportation and Public Facilities, defendants.
Case No: 4FA-86-2287 Civil
and
State of Alaska, plaintiff,
vs.
6.313 acres, more or less, Lars W. Ehrlander, et al, defendants.
Case No. 4FA-86-886
Date of hearing: July 15, 1988
Judge James R. Blair

HEARING ON STATE'S MOTION FOR SUMMARY JUDGMENT

THE COURT: Thank you. Well, the Court's already found that the taking in this case occurred sometime between 1983 and 1985, when the Borough delayed approval of the section of Mr. Ehrlander's subdivision, pending the State's decision on where it wanted to put the Geist Road Extension.

The exact moment of that taking is something that the new judge, whoever that may be, is going to have to decide. And that judge will have to make that decision based upon, I would guess, motions that are filed as to whether it has to be a jury decision based on the unique facts of the case. may well be this case -- but I haven't got the -- it may even be that the judge will have to sit throughout the whole trial, listen to it, then set a date of taking at the time of sending the instructions in. But until all the facts are out and presented, it would be my guess that we're not going to have an exact date of the taking going in. I'm certainly not going to set one now based on what I have.

The State's responsibility for the taking is based upon alleged influence that State officials had on the Borough decision-making process. Documents have been presented that previously been identified. The Court finds that these documents, when I read then in the light most favorable to Mr. Ehrlander -- which I must on the summary judgment case -- at least indicate that the State was advising the Borough about what parts of the Ehrlander subdivision to approve. I say they indicate that. I should say that taking them in the light most favorable to Ehrlander, I can't grant summary judgment the other way.

The State's current argument appears to be that the actions were only incidentally related to the taking so that the State can't have proximately caused that taking. I find that this issue is so connected

with the other issues of what influence the State asserted on the Borough that I've already held that's for the jury to decide. And it's not appropriate or possible for the Court to decide the matter summarily.

Signed on July 15, 1988 James Blair, Superior Court Judge

THE SUPREME COURT OF THE STATE OF ALASKA

Lars Ehrlander, appellant,
v.
State of Alaska, Department of Transportation and Public Facilities, appellee.

Superior Court No.4FA-86-2287 Civil
Supreme Court Nos. S-3129/S-3361/S-3383
[No. 3628 - August 24, 1990]

OPINION

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Niesje J. Steinkruger, Judge.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.
RABINOWITZ, Justice, concurring in part and dissenting in part.

INTRODUCTION

This case arises out of the denial of a request to subdivide real property located in Fairbanks. The owner of the property, appellant Lars Ehrlander, seeks inverse condemnation against the State of Alaska Department of Transportation (DOT). The trial court entered summary judgment in favor of DOT.

FACTS AND PROCEEDINGS

Ehrlander, a real estate developer, purchased unimproved property zoned by the Fairbanks North Star Borough for high-density housing. When he purchased it, he knew that part of the property lay within a corridor in which DOT was contemplating construction of an extension of Geist Road, but he believed that he would be able to subdivide the entire property because DOT told him that it would not object to the property being subdivided.

In August 1983, Ehrlander submitted his subdivision request to the borough platting board. DOT submitted a statement that it had no objection to the subdivision and noted DOT hoped to have "location approval" for Geist Road by "next winter." DOT also sent in a copy of Ehrlander's subdivision map on which the possible highway routes were marked in red.

On August 24, 1983, Ehrlander's application to the platting board for preliminary approval of the subdivision was denied in part and granted in part.[1] That which was granted lay north of the northernmost red line on the DOT map. Denial was based on the hope that DOT would soon decide precisely where to place the extension. The next day, one board member decided Ehrlander's proposal

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[1] See Appendix. The subdivision of sections A and B was denied. Approval was granted for the northerly portion of the tract.

should be reconsidered and a second hearing was scheduled for September 14.

Prior to reconsideration, DOT sent three letters to the platting board. The first stated that "[e]ven though there is a degree of uncertainty in the route location, we feel comfortable with designating the red line as a northern limit." It also reiterated that DOT expected to "have a firm decision on the project [location] in January, 1984." The second letter noted that DOT "could be ready to begin" acquiring the land in the highway's path "by the fall of 1984." DOT noted that ordinarily the design for the roadway might not have been completed for two to four years. However, "because of the impending development in this area[,] the Department would likely pursue the speedier [advanced acquisition] process," but this would require approval from the Federal Highway Administration. In the third letter, DOT communicated its approval of the board's prior action:

> Recommend phased development such that the first phase be allowed north of the proposed Geist Road Extension alternatives as shown on attached map (red line). Second phase development could take place after location approval is acquired, or Summer 1984, whichever is first.
>
> If the developer does not agree to phased development, we would like to suggest that a note be placed on the plat describing the potential Geist Road Extension alignment through the lots affected and the date of location approval (Summer 1984).

On reconsideration, the board affirmed its prior decision and suggested that Ehrlander return in the spring of 1984 when the progress of the highway project could be reevaluated and more of his property might be subdivided. Final platting board action took place in October 1983. Ehrlander did not appeal.

Later that fall, DOT, in cooperation with the borough, initiated the highway location process. Although the record does not disclose the outcome of those hearings, Ehrlander submitted a second application during the summer of 1984 requesting subdivision of a small additional portion adjacent to that portion which was already platted.[2] In a letter dated September 19, 1984, DOT informed Ehrlander's agent that it "[did] not see any conflict between the addition and the proposed Geist Road Extension." The letter noted that the "precise location has not been determined" but concluded that DOT "[did] not foresee any circumstance that would cause a shift to the north of the location shown on your plat." The new plat was approved by the borough on October 24, 1984.[3]

The state received location approval from the Federal Highway Administration on July 31, 1985. The state instituted condemnation proceedings on April 29, 1986. At that time, Ehrlander, who

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[2] See appendix. This is Section A of the appendix.

[3] Ehrlander claims a temporary taking of this portion.

allegedly had been unable to develop or sell the unsubdivided property, filed an action for inverse condemnation against the borough and DOT.

The actions were consolidated by Judge Blair. Ehrlander was granted partial summary judgment which declared that a taking occurred when the Borough denied, in part, his subdivision request. Left open were the questions whether the borough, or DOT, or both were responsible fox the taking, and the amount of damages. Judge Blair rejected defendants' argument that Ehrlander had failed to exhaust his administrative remedies when he did not appeal the borough's decision not to allow all of the property to be subdivided.

By stipulation, the condemnation action was severed from the inverse condemnation claim. The condemnation claim was to be tried first. The court ruled that in the inverse condemnation claim damages would run from August 24, 1983 (the date of the partial subdivision denial) to April 29, 1986 (the date DOT's condemnation action was brought).

At the condemnation trial, DOT contended that the property was worth $1.79 per square foot, for a total of $524,000. The jury awarded this amount.[4] By contrast, Ehrlander argued that the property should have been valued between $4.50 and $4.95 per square foot. Ehrlander did not appeal the verdict in the condemnation case.

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[4] The jury also awarded severance damages of $147,870.

Ehrlander settled his inverse condemnation claim with the borough. Shortly thereafter, Judge Steinkruger,[5] relying principally upon *Ben Lomond, Inc. v. Municipality of Anchorage* 76I P2d 119, 121-22 (Alaska 1988), granted DOT summary judgment because Ehrlander had not exhausted his administrative remedies since he had not appealed the borough's refusal to approve the subdivision as to part of his property. The trial court reasoned primarily that had Ehrlander appealed the refusal, the borough planning commission might have approved the request and thereby eliminated any damage.[6] Following this, the inverse condemnation action was dismissed. Ehrlander appeals.

DISCUSSION

I.

Ehrlander bases his claims on the theory of inverse condemnation. Inverse condemnation in its classic form entails a physical invasion of private property by government without formally exercising the power of eminent domain. 3 *Nichols' The Law of*

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[5] The case was assigned to Judge Steinkruger after Judge Blair left the bench.

[6] The trial court stated in part:

> Had the plaintiff filed an appeal to the Planning Commission with both the constitutional and non-constitutional issues which he has raised before this court with regard to claims against the Fairbanks North Star Borough and the State of Alaska . . . .
>
> As in *Lomond*, the successful pursuit of this claim through administrative process could have obviated the need for judicial review. Furthermore, such a review would have completed the factual context for judicial review, if necessary. These benefits justify application of the exhaustion doctrine of *Lomond* to the instant case.

Eminent Domain § 8.1[4] (1971); *State, Dept. of Highways v. Crosby*, 410 P2d 724, 728, 729 (Alaska 1966); *Wickwire v. City and Borough of Juneau*, 557 P2d 783, 784 (Alaska 1976). This is not such a case as there was no physical invasion by the state until the condemnation action was filed. Instead, Ehrlander claims that DOT through a series of actions effectively denied him the benefits of ownership of his property.

Recently, in *Homeward Bound, Inc. v. Anchorage School District*, 791 P.2d 610 (Alaska 1990), we acknowledged that an action for inverse condemnation might lie where a land use planning classification deprives a private property owner "of the economic advantages of ownership of the property." Id. at 614. Other jurisdictions have also recognized that a regulation or land use decision may give rise to an inverse condemnation action. [7]

Article 1, section 18 of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." This clause is to be interpreted liberally in favor of the property owner. *State v. Doyle*, 735 P.2d 733 (Alaska 1987). The inclusion of the term "damage" affords the property owner broader protection than that conferred by the Fifth Amendment to the Federal Constitution. Id. The objective of just compensation is to

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[7] *See 3 Nichols' The Law of Eminent Domain* Sec. 8.1 [4] (1989); 7A *Nichols, supra*, Sec. 14.03.

place the property owner "as fully as possible in the same position as he was in prior to the taking of his property." *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 150 (Alaska 1971). These principles are applicable not only to ordinary eminent domain proceedings, but to actions in inverse condemnation. Doyle, 735 P.2d at 733.

II.

Ehrlander's first point on appeal is that the court erred in dismissing his complaint on the grounds of failure to exhaust administrative remedies because he had claims which were not based on the action of the platting board. Ehrlander claims that DOT delayed unreasonably in bringing the condemnation proceedings after it announced its intention to utilize Ehrlander's property for the highway expansion and that this amounts to an imputed taking.[8] Alternatively, Ehrlander argues that even if there were no imputed taking, DOT acted unreasonably prior to instituting the condemnation

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[8] In support of his theory, Ehrlander cites *Roth v. City of Las Angeles v. Tilem*, 191 Cal. Rptr. 229, 234 (Mo. App. 1983); *Traper v. City of Long Beache*, 181 Cal. Rptr 169, 180 (Cal. App.1982); *Lange v. State*, 547 P.2d 282, 287 (Wash. 1976); *Drakes Bay Land Company v. United States*, 424 F.2d 574, 586 (Ct. Cl. 1970); *Washington Market Enterprises v. City of Trenton*, 343 A.2d 408, 410 (N.J. 1975); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966) aff'd 405 F.2d 138; *Conroy-Prugh Glass Co. v. Commonwelth Dept. of Transp.*, 321 A.2d 598, 602 (Pa. 1974).

action, causing a decline in the value of his property, and that he is entitled to damages for the decline.[9]

In response, DOT argues, first, that Ehrlander did not raise these theories in opposition to the state's motion for summary judgment. This argument is incorrect with respect to Ehrlander's first theory, that DOT's delay amounted to an imputed taking. This theory was raised and argued in Ehrlander's opposition to DOT's motion for summary judgment filed July 1, 1988, which was incorporated by reference in his opposition to the state's motion which was granted by Judge Steinkruger. However, Ehrlander's theory that he is entitled to damages for unreasonable conduct by DOT which fell short of a taking, but depressed the value of Ehrlander's property, was not raised in opposition to DOT's motion for summary judgment. It is thus waived, and we will not consider it.[10]

DOT's second argument is that Ehrlander did not raise a prima facie case of state delay of such magnitude as to amount to an imputed taking. "Absent extraordinary delay or a bad faith motive to depress land prices, the state's project planning and acquisition activities cannot result in a taking."

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[9] In support of this theory, Ehrlander cites *Klopping v. City of Whittier*, 500 P2d 1345 (Cal. 1972).

[10] *Williams v. Alyeska Pipeline Serv. Co.*, 650 P.2d 343, 351 (Alaska 1982).

In general, the cases cited by Ehrlander in support of the imputed taking theory[11] involve conduct on the part of the condemning authority which was designed to prevent development of the property in question in order to minimize acquisition costs.[12] Often, extraordinary delay was also involved.[13] Neither of these factors seem to be present here, at least not clearly.

Lange v. State, 547 P.2d 282 (Wash. 1976), is the case most favorable to Ehrlander's position. Lange was in the process of developing land for housing purposes when the marketability of his land was substantially impaired by a series of highway department actions leading to an announcement made on December 1, 1969 that a proposed highway would include most of Lange's land. In October of 1971, the state filed an action to condemn Lange's property. Lange had, in the meantime, filed an action in inverse condemnation. After the two actions were consolidated, the trial court dismissed the inverse condemnation action, finding that the delay was not unreasonable and that although there was a decline in value of the property between 1969 and 1971, it was caused not by the actions of the condemnor but by a general decline in property values in the area. Id. at 283-84.

[11] See Footnote 8.

[12] E.g., *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775 (Mo. app. 1985); *Drakes Bay Land Co. v. United States*, 424 F2d 574 (Ct. Cl. 1970)

[13] Id.

On appeal, the Supreme Court of Washington reversed and held that the highway department had taken Lange's property as of December 1, 1969. The supreme court did not take issue with the trial court's finding that the delay had not been unreasonable and that the condemning authority had not caused a decline in the value of the property. Id. at 284. Nonetheless, it noted that the state's action had effectively deprived Lange "of the most important incidents of ownership, the rights to use and alienate property." Id. at 288. The court announced a four-part test for application in future cases:

> For the time of valuation to be advanced, [1] marketability must be substantially impaired and [2) the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. [3) The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. [4] Further, the owner must have taken active steps to accomplish this purpose. A property owner who purchased land or took steps to market it in contemplation of the condemnation could not insulate himself from a later general decline in market values and benefit from the holding in this case. Id.

In *Stewart & Grindle v. State*, 524 P.2d 1242, 1247 (Alaska 1974), we recognized the plight of the owner of unimproved land who is unable to sell or develop it because of a pending condemnation action. The question in that case was whether interest on the condemnation award should run from the date eminent domain proceedings were instituted to the date of payment into the registry of

the court of the actual award of just compensation.[14] We recognized that possession of unimproved and untenanted property is a desirable economic asset only if: "(1) the property may appreciate in value; and (2) the owner is afforded the opportunity to improve the property toward whatever end he might desire." We noted that these economic attributes were lost when a condemnation action was brought because of a statute which fixed the valuation date as the date of the issuance of the summons and precluded inclusion of improvements put on the property after the date of the summons.[15] We went on to note:

> Meanwhile, the owner remains liable for property taxes, mortgage payments and any other expenses incidental to legal ownership. Indeed, the property is of less value in his own name than it would be had the state taken immediate legal possession under a declaration of taking, for at least on the latter case he would be delivered from the burden of the property taxes. If, as a matter of constitutional law, the property owner is entitled to interest from the moment that the state takes legal possession, he should, a fortiori, receive interest when he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities.
>
> Admittedly, between the filing of an action and settlement or judgment, the state derived no benefit from unimproved land either. But the state's benefit is irrelevant. The constitutional mandate is

[14] The state did not use the declaration of taking procedure, as it did in this case, nor did it enter into immediate possession. Thus it was unclear as to when interest would begin to run.

[15] AS 09.55.330.

> framed in terms of just compensation for the owner, and just compensation is not conditioned on receipt of commensurate value by the state.
> 524 P.2d at 1247.

In our view this reasoning should be applicable not merely when a condemnation action is formally begun, but whenever a property owner is, by reason of an impending" condemnation, deprived of the economic advantages of ownership. That was the rationale of the Washington court in *Lange:*

> Once the state manifested its unequivocal intent to appropriate the Lange property, appellants were precluded from exercising their business judgment and selling the property before the market fell further. Moreover, appellants were precluded' from taking any steps to counteract the 'market decline by making improvements on the land or otherwise changing its use. Thus appellants were deprived of the most important incidents of ownership, the rights to use and alienate property.

547 P.2d at 288. We thus agree with *Lange* and believe that its holding should be applicable here. As the *Lange* test does not require either extraordinary delay or a bad faith motive to depress land prices, the state's argument that the absence of these factors means that Ehrlander has not made a prima face case of an imputed taking must fail.

For this reason, summary judgment was improperly granted in favor of DOT. The judgment in favor of DOT.[16] The just therefore

[16] The exhaustion doctrine articulated in *Ben Lomond* does not control. In the fall of

be reversed and this case remanded for a determination of whether the four *Lange* elements can be factually established.[17]

III.

1983, when Ehrlander was forced to decide whether to pursue an appeal to the planning commission, he could not have presented a claim based on *Lange*. *Lange* requires, inter alia, that the property owner demonstrate (1) substantially impaired marketability and (2) unequivocal statements of an intent to take a specific parcel. In the fall of 1983, the marketability of Ehrlander's property may not have substantially declined because the platting board had indicated it would take a second look in the spring of 1984. A prospective buyer might reasonably have relied on this and so, of course might have Ehrlander in deciding not to appeal. As to when DOT unequivocally expressed its intent to take Ehrlander's property there is a factual dispute. Under one view of the facts, such did not occur until long after the 30-day period for administrative appeals had expired. See n.17, infra.

Further, even if Ehrlander had appealed and won, Ehrlander would still have the opportunity to argue that there was an imputed taking under the *Lange* theory. The only effect subdivision might have had is that *Lange* might have sold the property before its marketability was substantially impaired. This, however, is speculative and it cannot be said with confidence that the administrative appeal would have eliminated the need for judicial review.

[17] We note in particular that there seems to be a conflict in Ehrlander's position as to when DOT expressed an unequivocal intention to take the specific property in question. Ehrlander in his brief before this court contends that DOT was firmly committed to taking his property by October 26, 1983. However, in his motion for a new trial in the condemnation case, Ehrlander claimed that "at least until July of 1985, if not later, the location of the project was indefinite . . ."

Ehrlander's second point on appeal is that even as to his claim which is based on the partial denial of his subdivision application by the platting board, his failure to exhaust available administrative remedies is no bar. We do not reach this question as we are of the view that Ehrlander has shown no facts which would give rise to DOT's liability for the borough platting board's partial denial of the subdivision.[18]

There are a number of authorities which hold that a condemning authority is responsible for an inverse condemnation where it persuades a platting or planning agency to impose restraints on the use or development of property in order to minimize the acquisition costs of a contemplated project.[19] In the present case,

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[18] In affirming a judgment, this court may rely on grounds different from those employed by the court below. *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961). Further, we express no view as to wether the partial denial of Ehrlander's subdivision request amounted to an imputed taking on the part of the borough.

19 E.g., *Roth Highway Commission of Missouri*, 688 S.W.2d 775 (Mo. App. 1985) (highway engineer urged municipality to refuse rezoning and deny building permits for property in the pathway of a proposed highway); *Gaughen v. Commonwealth, Depart. of Transportation*, 554 A.2d 1008 (Pa. Cmwlth. 1989) (Dot repeatedly asked township to delay development within highway corridor and interfered with developer's efforts to obtain finincing); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970) (National Park Service actively thwarted proposed subdivision of property slated for inclusion in seashore area).

however, it does not appear that DOT urged the platting board to disapprove any part of Ehrlander's proposed subdivision.

DOT signed a form stating that it had no objection to the full subdivision on July 21, 1983, and reiterated this position in another comment dated August 18, 1983. The partial rejection of the subdivision took place on August 24, 1983. When reconsideration was sought, DOT filed a platting review comment which recommended the phased development that the board had initially settled on, but stated: "If the developer does not agree to phased development[,] we would like to suggest that a note be placed on the plat describing the potential Geist Road Extension alignment through the lots affected and the date of location approval (Summer 1984)." Ehrlander stated that he had no objection to the note suggested by DOT on the final plat. The recommendation to the platting board that it adhere to the action that it had already taken was not an action sufficient to make DOT liable for an inverse condemnation as it was explicitly conditioned on Ehrlander's agreement. As of September 14, 1983, when the platting board denied reconsideration, DOT's position was neutral. [20]

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20 The Supreme Court of California has stated in a similar context:

> If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would

We therefore affirm the grant of summary judgment in favor of DOT with respect to Ehrlander's claim that DOT is liable for the partial denial of Ehrlander's subdivision plat.

IV.

For the foregoing reasons, the judgment of the superior court is reversed in part and remanded for further proceedings in accordance with this opinion. In the event that an inverse condemnation is found, interest should run from the date of the inverse condemnation until April 29, 1986. Whether interest should be calculated on the award already made by the jury in the condemnation trial or whether a new value should be determined for the purpose of calculating interest is a question which has not been briefed and we express no opinion on it.

REVERSED IN PART and REMANDED.

RABINOWITZ, Justice, concurring in part and dissenting in part. I agree that "Ehrlander has shown no facts which would give rise to DOT's liability for the borough platting board's partial denial of the subdivision," and that the exhaustion doctrine articulated in *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 121-22

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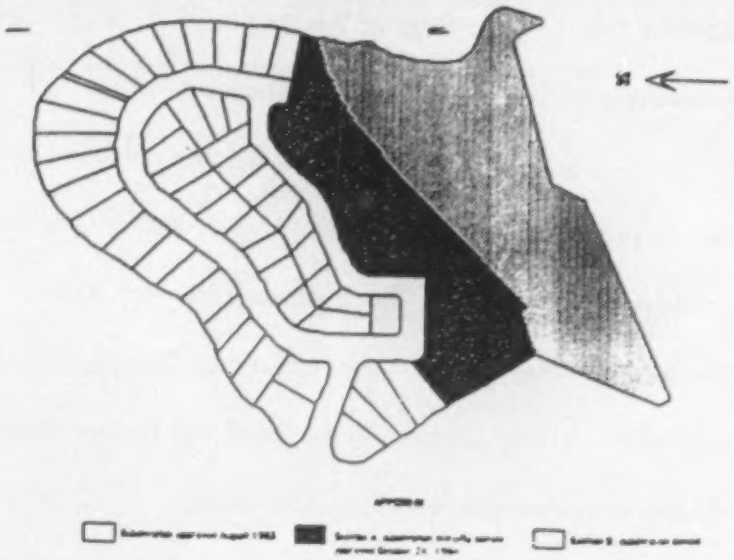
come to a halt, or deteriorate to publication of vacuous generalizations regarding the future of land

Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111, 117 (Cal. 1973).

(Alaska 1988) does not bar Ehrlander from pressing an inverse condemnation claim against the state regarding that portion of his land designated as "Section " in the appendix. I believe *Ben Lomond* is dispositive, however, of Ehrlander's claim to a temporary taking of "Section A." No article I § 18 inquiry whatsoever regarding this parcel would now be necessary had Ehrlander successfully appealed (in whole or in relevant part) the Board's October 1983 partial denial. *See Ben Lomond*, 761 P.2d at 122.

APPENDIX



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
State of Alaska, Department of Transportation and Public Facilities, defendants

Case: 4FA-86-2287 Civil

Signed: 2-5-91
Judge: Niesje J. Steinkruger

ORDER REGARDING LAW OF THE CASE

This matter comes before the court upon the motion of the State to determine the law of the case. This court has considered the pleadings and documents filed, the arguments of counsel, and held a hearing on January 28, 1991. Being fully advised,

IT IS HEREBY ORDERED that upon the opinion of the Supreme Court of the State of Alaska no. 3628, August 24, 1990, the following is the law of the case for trial upon remand.

1. Upon remand, the fact finder may consider whether or not the Department of Transportation and Public Facilities delayed unreasonably in bringing the condemnation proceedings against the plaintiff following its announced intention. The plaintiff must present admissible evidence pursuant to the four *Lange* factors for determination of inverse condemnation and imputed taking.

2. Upon being allowed to amend the complaint to plead *Klopping* damages, the fact finder will determine whether or not the Department of Transportation & Public Facilities acted unreasonable

prior to instituting the condemnation action causing decline in the value. This argument has not been previously considered by the trial court and because it was not considered at the trial level, this alternative theory was waived and not considered by the supreme court. The plaintiff has ten (10) days within which to file a motion to amend the complaint.

3. This court granted summary judgment and the supreme court affirmed summery judgment in favor of the State finding that the Department of Transportation & Public Facilities has no liability for the actions of the Fairbanks North Star Borough platting board's partial denial of subdivision to the plaintiff. This issue will not be before the court on remand and evidence going to this issue is not admissible.

DATED this 5 day of February, 1991, at Fairbanks, Alaska

Niesje J. Steinkruger, superior court judge.

IN THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Petitioner and Cross-Respondent,
v.
Lars Ehrlander, Respondent and Cross-Petitioner.

Superior Court No. 4FA-B6-2287 Civil
Supreme Court Numbers S-4460/S-4508

July 3,1991

Before: Rabinowitz, Chief Justice, Hurke, Matthews, Compton and Moore, Justices.

ORDER

On consideration of the petition f or review, filed March 26, 1991, and the response, filed April 8, 1991; the cross-petition for review, filed April, 1991, and the response, filed April 18, 1991,

IT IS ORDERED with respect to the petition of the State (S-4460):

l. The petition is granted.

2. Paragraph 2 of the Order of February 5, 1991, is reversed. Under AS 34.60.120(3), a decrease in the value of property caused by the public improvement for which the property is acquired or by the likelihood that the property would be acquired for the improvement must be disregarded in determining just compensation. Just compensation has been established in this case by the verdict of the jury. Allowing the theory expressed in paragraph 2 of the Order of February 5, 1991, to be tried would improperly reopen the issue of just compensation.

3. The issue on retrial should be whether there was an inverse condemnation. If an inverse condemnation is found, Ehrlander is entitled to interest, but not damages, from the date of the inverse condemnation until April 29, 1986. As expressed in our prior opinion, it is an open question whether a new value should be determined for the purpose of calculating interest. *See Ehrlander v. State, Dept. of Transp.*, 797 P.2d 629, 636 (Alaska 1990). On remand the court should enter an order narrowing the issues to be litigated in accordance with this order.

IT IS FURTHER ORDERED with respect to Ehrlander's cross-petition (S-4588) that the cross-petition of Lars Ehrlander is denied.

Entered by direction of the court, Rabinowitz, C. J., dissenting.[1] Done at Anchorage, Alaska on July 3, 1991.

CLERK OF THE SUPERIOR COURT

Yvonne I. Anderson, Acting Clerk of Court

[Petition for rehearing Denied on August 22, 1991.]

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,

vs.

State of Alaska, Department of Transportation and Public Facilities, defendants.

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[1] Chief Justice Rabinowitz would deny the petition.

Case: 4FA-86-2287 Civil
Signed: 9-25-91
Judge: Niesje J. Steinkruger

ORDER RE: CLARIFICATION

Upon consideration of the State's motion for Clarification, this court is unable to identify any other recognizable legal theory of inverse condemnation other than *Lange* contained in plaintiff's amended complaint. In order to assist the court in deciding the motion for clarification before it,

IT IS HEREBY ORDERED that

1. Plaintiff shall set out specifically in a pleading, not more than (5) pages, each asserted basis of inverse condemnation other than Plaintiff shall number each separately, set forth both the factual and legal basis and how it differs from the other theories.

2. In the alternative, plaintiff may file a certificate that he agrees the case will proceed on the *Lange* theory.

3. Plaintiff has ten (10) days within which to file either of the above mentioned pleadings.

4. After the court reviews the plaintiff's resiance to this order it will consider whether any responsive pleading by the defendant may be of assistance and will enter further order.

DATED this 25 day of September, 1991, at Fairbanks, Alaska.

Signed Niesje J. Steinkruger, Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
State of Alaska, Department of Transportation and Public Facilities, defendants.

Case: 4FA-86-2287 Civil
Signed: 11-22-91
Judge: Niesje J. Steinkruger

DECISION ON MOTION FOR CLARIFICATION

I. Summary of Prior Proceedings

Previously in this case, the Alaska Supreme Court held that "this case [should be] remanded for a determination of whether the four *Lange* elements can be factually established. *"Ehrlander v. State Dept. of Transp.*, 797 P.2d 629, 635 (Alaska 1990).

Subsequent to the Supreme Court's decision a dispute arose between the parties. This dispute involved whether the Supreme Court's decision precluded an argument by Ehrlander regarding a theory of damages under the case of *Klopping v. City of Whittier*, 500 P.2d 1345 (Cal. 1972). By order dated February 5, 1991, this court held that because the *Klopping* theory had not been considered at the trial level, this theory had not been waived and not considered by the Supreme Court. Accordingly, this court allowed, by the February 5 order, Ehrlander to amend his complaint to add the *Klopping* theory.

On March 1, 1991, Ehrlander filed an amended complaint, which included the *Klopping* theory as well as other purported

theories of inverse condemnation. The other purported theories are now the subject of the current motion for clarification.

By order dated July 3, 1991, the Supreme Court reversed the portion of this court's February 5th order that had allowed Ehrlander to argue the *Klopping* theory. This order stated in part:

> Allowing the theory expressed in paragraph 2 of the Order of February 5, 1991 to be tried would improperly reopen the issue of just compensation. . . .
>
> The issue of retrial should be whether there was an inverse condemnation.

As ordered by the Supreme Court's July 3rd order, this court issued an order dated August 8, 1991. This order stated that the remaining issues to be determined were:

> (1) whether there has been an inverse taking, (2) the date of the taking, and (3) whether a new value for the property taken should be determined if there is a taking or if the value of Parcel 20 A established by the jury in the formal condemnation case will be used.

Subsequent to a case conference held with the parties, this court issued another order dated August 12, 1991. This August 12th order stated in part:

> The parties agree that the three potential issues which may be raised on summary judgment are: (1) was there an. inverse condemnation (a) under Lange, (b) under any other theory; (2) if there was an inverse condemnation, what is the date of taking; (3) if there was a taking what value should be used to compute interest.

II. Issues Remaining for Determination by the Court

Presently, the State of Alaska moves the court for an order of clarification. The State alleges that there are inconsistencies in the rulings from this court and the Supreme Court which need to be clarified. The State argues that this court's order of August 12, 1991, is in conflict with three other rulings: (1) the Supreme Court's order of July 3, 1991; (2) the Supreme Court's Opinion in *Ehrlander v. State Dept. of Transp.* 797 P.2d 629 (Alaska 1990); (3) this court's order of August 8, 1991. The State asserts that the order of August 12, 1991, states that one of the issues to be decided on summary judgment is whether there was an inverse condemnation under any theory, other than *Lange*. The State argues that this is not a proper issue in the case. The State claims that the three above rulings either expressly or implicitly state that the only inverse condemnation claim that will be allowed is the *Lange* theory. Accordingly, the State claims that the August 12 order should be clarified to conform with the prior rulings.

Ehrlander argues that the Supreme Court did not state that Ehrlander was barred from establishing an inverse condemnation under theories other than *Lange*. Ehrlander states that the Supreme Court only barred the *Klopping* damages theory and thereafter Ehrlander should be allowed to proceed with other theories of inverse condemnation.

The Supreme Court's original opinion is clear and dispositive of this dispute. As stated previously, in *Ehrlander v. State*, 797

P.2d 629, 635 (Alaska 1990), the Supreme Court held the case should be remanded to determine "whether the four *Lange* elements can be factually established." The court did not hold that this court should determine whether *Lange* and any other inverse condemnation theory could be established. Ehrlander argued other cases and other theories in this brief to the Supreme Court, but apparently the court found no other valid argument. The Supreme Court explicitly limited the remand of this case to only allow for the *Lange* claim.

The Supreme Court did in its July 3rd order, refer to inverse condemnation generally rather than specifically to *Lange* as Ehrlander alleges. However, this does not imply that the Supreme Court's order allows claims other than *Lange*. *Lange* was the only inverse condemnation claim which had been allowed by the Supreme Court. Therefore, the court had no reason to refer specifically to *Lange* when it was the only valid claim that had been acknowledged. "Where an appellate court issues a specific mandate, the general rule is that a trial court has no authority to deviate from it." *Gaudiane v. Lundgren*, 754 P.2d 742, 744 (Alaska 1988); *King v. Alaska State Housing Auth.*, 571 P.2d 1010, 1011 (Alaska 1977). It appears in the instant case that the Supreme Court's mandate was specific that the only major issue to be determined on remand was whether a valid *Lange* claim existed. It would

be improper for this court to deviate from the Supreme Court's specific mandate.

III. Conclusion

The supreme Court holding in *Ehrlander* specifically allows only for a determination as to whether a valid *Lange* claim exists. The three issues that are left to be determined are (1) whether there was a taking of Ehrlander's property at a date earlier than what is alleged by the State according to the *Lange* element (inverse condemnation); (2) if an earlier taking is found, the date of that taking; (3) if there was an earlier taking what value should be used to compute interest. Insofar as the issues stated in this court's order dated August 12, 1991, vary from the above stated issues, that order is vacated. There fore, the court will only consider Ehrlander's *Lange* claim in pending and future dispositive motions and at trial. Plaintiff and defendant shall each have fifteen (15) days from the date of distribution of this order to oppose the respective motions for summary judgment.

DATED this 22 day of November, 1991, at Fairbanks, Alaska.

Signed by Niesje J. Steinkruger, Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

State of Alaska, Plaintiff,
vs.
6.313 acres, more or less, Lars W. Ehrlander, et al, Defendants
Case No. 4FA-86-886 CIV

Judge Niesje J. Steinkruger, Superior Court Judge
Mar 6, 1992

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

Upon consideration of the plaintiff's Motion for Relief from Judgment, dated December 9, 1991, and the court having considered the opposition of the State of Alaska,

IT IS HEREBY ORDERED that said motion is denied. The court further determines that said motion was frivolous and unnecessary, and therefore awards the State of Alaska its reasonable costs and attorney's fees. The state may file a motion for the determination of the amount of its award.

Dated: 3-6-92

Signed: Niesje J. Steinkruger, Superior Court Judge.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
State of Alaska, Department of Transportation and Public Facilities, defendants.

Case: 4FA-86-2287 Civil

Signed: 5-18-92
Judge: Niesje J. Steinkruger

ORDER RE: SUMMARY JUDGMENT

I. INTRODUCTION

This action involves an inverse condemnation action against the State by Ehrlander, the owner of the property. These motions come before the court after remand from the Alaska Supreme Court in *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990). Previously, this court had granted summary judgment against Ehrlander in favor of the State. On appeal, the Supreme Court reversed in part and remanded for a determination of whether the elements of *Lange v. State*, 547 P.2d 282 (Wash. 1976) could be factually established.

II. EHRLANDER'S AND THE STATE'S MOTION FOR SUMMARY JUDGMENT BASED UPON LANGE

Both parties have moved for summary judgment on liability under the *Lange* theory of inverse condemnation. *Lange v. State*, 547 P.2d 282 (Wash. 1976), is the imputed taking theory that the Supreme court adopted in *Ehrlander*, 794 P.2d at 634-35. This four-part test states:

> For the time of valuation to be advanced, [1] marketability must be substantially impaired and [2]

> the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. [3] The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. [4] Further, the owner must have taken active steps to accomplish this purpose. A property owner who purchased land or took steps to market it in contemplation of the condemnation could not insulate himself from a later general decline in market values and benefit from the holding in this case.

Lange, 547 P.2d at 288.

Ehrlander claims that he has met all four elements of *Lange* as a matter of law and is therefore entitled to summary judgment. The State, however, has claimed that Ehrlander has not satisfied elements 1, 2 and 4 and summary judgment is proper in favor of the State.

A. Whether the State Evidenced an Unequivocal Intention to Take Ehrlander's Land

1. The Standard for Unequivocal Intent to Take

Ehrlander has maintained that the State evidenced an unequivocal intent to take his land as a matter of law. Ehrlander claims that the taking occurred at one of three alternative times. First, Ehrlander argues that the taking occurred on August 19, 1983. On this date, Ehrlander claims that at a meeting, the State indicated it would utilize the advance acquisition procedure to take Ehrlander's property.

Second, Ehrlander asserts that his land was taken on August 26, 1983, when he entered into an agreement with the State and the Borough. Ehrlander claims that this agreement provided that Ehrlander would not build anything on the property which the State

intended to take until the spring or summer of 1984. Under this agreement, the State would not oppose Ehrlander's plans to subdivide land not used for the Geist Road Extension, would use the early acquisition process to acquire Ehrlander's property in the spring or summer of 1984, and would pay subdivided prices for that property taken. The Borough under this alleged agreement was to approve in part Ehrlander's subdivision plans and approve the remaining portion of the subdivision in the spring or summer of 1984.

Thirdly, Ehrlander claims that if the taking did not occur on either of the two prior dates, it "occurred within the next few months." In support of these dates Ehrlander has submitted various affidavits, and exhibits.

The State disputes that a taking occurred on any of the dates claimed by Ehrlander. The State's main argument on this issue is that for Ehrlander to prove intent to take by the State, he must show that the State imposed some type of legal restraint on Ehrlander's property which prohibited its development. The State supports this argument by reasoning that in *Lange* the Washington court found an earlier valuation date because the law of Washington required the state to file a "formal notice" of the taking. *Lange*, 547 P.2d at 287. Once this formal notice was filed; the property owner was prohibited from developing the property prior to actual condemnation proceedings. The

Washington court in *Lange* moved the valuation date forward to the date the formal notice was filed; the date of the legal restraint.

The State argues that contrary to Washington, Alaska has no similar statute that would legally restrain Ehrlander from developing property prior to the declaration of taking. In fact, the State claims that under Alaska law property owners are free to improve their property and are entitled to compensation for the value of such improvements up to the time a condemnation action is filed. Other courts have recognized this "legal restraint" requirement for an imputed taking. "[B)efore a de facto taking results there must be a physical invasion or direct legal restraint." *Klopping v City of Whittier*, 500 P.2d 1345,1351 (Cal. 1972); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 253, 321 N.Y.S.2d 345, 356, 264 N.E.2d 895, 902 (1971).

A legal restraint to development by the State should not be a prerequisite for finding an "unequivocal intent to take" in Alaska. Logically, Ehrlander should be given the opportunity to prove intent by means other than a formal legal restraint. Suppose for example that the condemning authority had admitted and published that it intended to take a specific portion of property at a much earlier time than it actually filed its declaration of taking. If a legal restraint were a requirement to finding an "intent to take," even a publicly known admission would be insufficient for a finding of intent.

Furthermore, as the State has already asserted, Alaska has no procedure for tying up or restraining an owner from using his land prior to the declaration of taking. If a legal restraint was a prerequisite to finding that a taking had occurred, no landowner in Alaska would ever be able to establish a prima facie case under *Lange*. Under the state's reasoning, intent would never be provable in Alaska because the law provides for no legal restraint on property prior to formal condemnation. Clearly the Supreme Court would not be so nearsighted as to adopt a cause of action that could never be proven in the State.

Alaska case law does provide some guidance on what is required to prove an "intent to take" by the State. *In Homeward Bound v. Anchorage School Dist.*, 791 P.2d 610 (Alaska 1990), the Municipal Assembly of Anchorage twice passed a resolution selecting the plaintiff's property as a site for a school. The School Board however, refused to buy the plaintiff's property claiming the City had no need for a new school in the area. The property owner then brought suit against the Municipality and the School District seeking in part to recover damages for the diminution in value of the property. The supreme court considered the intent of the City and stated: "(I)n cases such as this one where the alleged taking is based on precondemnation decisions concerning the subject property, the objective manifestation of the government's intention to take the property are critical to the

decision whether there was a taking." I.d. at 614. The court went on to adopt the reasoning of *Selby Realty Co. v City of San Buenaventura*, 10 Cal.3d 110, I09 Cal. Rptr. 799, 514 P.2d 111 (1973).

> [I]n *Selby* . . .the court held that the mere enactment of a general plan showing proposed streets extending through private property did not constitute a taking because there was no present concrete indication that the county either intends to use plaintiff's property for the proposed streets or that ft intends to acquire the property by condemnation. The court distinguished *Klopping* on the ground that the adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. *Homeward Bound*, 791 P.2d at 614. *See Ehrlander*, 797 P.2d at 636 n.20. The court then found that the city's "designation" of Homeward Bound's property as a potential school site did not amount to a "concrete indication that it intended to condemn the property." Id.

To make an sufficient showing of an "'unequivocal intent to take" a condemnee must present more than mere planning activity by the State. In order to prove intent, a condemnee must show under Alaska law that objectively the condemning authority manifested a concrete indication that it intended to condemn the property. Thus, if a reasonably prudent person would consider that the State actions firmly declared that the State intended to take the property, an intent to take should be found.

2. Whether the Alleged Agreement Between Ehrlander, the Borough and the State is Sufficient Evidence of Intent to Take

The State argues that the alleged agreement between Ehrlander, the Borough and the State should not be considered as

evidence of the State's intent to take. The State contends that although this agreement was supposedly made in 1983, and this case has been in litigation since 1986, this agreement was mentioned for the first time in a pleading in 1991. The State asserts that the existence of this agreement is in conflict with prior statements of Ehrlander and other parties and individuals in this case. Accordingly, the State claims that such a self-serving, after the fact statement is not legally sufficient to withstand summary judgment. In *Peterson v. Wirum*, 625 P.2d 886 (Alaska 1981), the court held:

> Differences of opinion among the parties as to their subjective intent, expressed during the litigation, do not establish an issue of fact regarding the parties reasonable expectations . . . since such self-serving statements are not considered to be probative.

Id. at 870. Therefore, if Ehrlander's affidavit alleging the existence of the agreement was the only evidence regarding this argument, there would not be sufficient evidence to overcome a summary judgment. However, other evidence of this alleged agreement has been submitted. The affidavit and deposition testimony of Herbert Mann, the Borough Planning Officer, is evidence of the existence of a similar "gentlemen's agreement" between the same participants.

The State argues that Mr. Mann's claims of this "gentleman's agreement" cannot be used as evidence. The State claims that because Webster's Dictionary defines "gentleman's agreement" as

"not legally binding," the alleged agreement cannot be used as evidence of intent.

Even if Webster's Dictionary was relevant evidence as to whether this agreement was in fact legally binding, Mr. Mann's statements regarding the agreement would still be valid evidence. Ehrlander is not trying to enforce this so-called "gentleman's agreement." Rather he is using the agreement to show evidence of the State's intent to take. Therefore, this agreement is sufficient evidence to withstand summary judgment by the state. This agreement if taken as true would create a question of fact as to whether the agreement objectively manifested a concrete Indication that the State intended to take Ehrlander's property at the time of the agreement.

a. Whether Evidence of the Alleged Agreement is Barred by Res Judicata

The State has claimed that evidence of the alleged agreement between Ehrlander, the State and the Borough is barred by *res judicata*. *Res judicata* precludes a subsequent suit between the same parties asserting the same cause of action when the matter was raised or could have been decided in the first suit. *Summerville v. Denali Center*, 811 P.2d 1047, (Alaska 1991). Assuming arguendo that a claim based on the agreement would be barred by *res judicata*, Ehrlander has asserted no such cause of action based on the agreement. Instead, Ehrlander is merely using the alleged agreement as evidence of intent, an element of

his cause of action based on *Lange*. Accordingly, res judicata does not bar evidence of the agreement.

b. Whether Evidence of the Alleged Agreement is Barred by the Statute of Limitations and the Statute of Frauds

The State has presented two more arguments that the evidence of the alleged agreement should not be considered by the court in determining the State's intent to take. First, the State argues that the alleged agreement is barred by the six year statute of limitations for claims based upon a contract (AS 09.I0.050). Second; the State claims that because the alleged agreement was not in writing, it is unenforceable under the statute of frauds (AS 09.25.010).

Both of these arguments are erroneous. Ehrlander has asserted no claim based on the agreement which would invoke the statute of limitations. Likewise, Ehrlander is not attempting to enforce the agreement which would then make a writing required. Ehrlander is only using the agreement as evidence that the State intended to condemn his property at a time earlier than the declaration of taking. Since Ehrlander has asserted no claim for breach of contract and has not tried to enforce the oral agreement, clearly the statute of limitation and the statute of frauds do no bar the evidence of the alleged agreement.

3. Whether there is Sufficient Evidence that the State Intended to Take Ehrlander's property at an Earlier Date by Using the Advanced Acquisition Method

Ehrlander maintains that the State's unequivocal intention to take his property may have occurred on August 19, 1983. Ehrlander claims that on this date during a meeting between Ehrlander's representatives, Borough officials and the State, the State indicated that it would be using the advance acquisition method.

The State argues that even if it did agree to utilize the advance acquisition method such a statement does not rise to the level of an unequivocal intention to take. The State also contends that since the State did approve advance acquisition of Ehrlander's property, Ehrlander is now prohibited from claiming that the State actually took the property at an earlier date.

Ehrlander's evidence that the State indicated that it intended to use the advance acquisition method to the Ehrlander's property is sufficient evidence of unequivocal intent to take to withstand summary judgment. Although such evidence could be considered merely planning activity by the State, Ehrlander's evidence raises a question of fact as to whether such an indication by the State is only planning activity or rises to the level of an unequivocal intent to take.

If the facts the State presents at trial show that objectively the State manifested a concrete clear indication that it intended to

condemn Ehrlander's property, then an unequivocal intent to take should be found. However, if by the indication by the State to use the advance acquisition method it was clear that the State had not decided on a specific route for the plan, the plan was not settled and still in the development stage or the State was only engaging in reasonable planning activity, then an unequivocal intention to take should not be found.

B. Whether the Marketability of Ehrlander's Property Was Substantially Impaired

The State has claimed that Ehrlander has not proven that the marketability of his property was substantially impaired by the State's actions. The State argues that under *Lange* Ehrlander must show that his loss vas a direct consequence of State action which prohibited development of the property. *Lange,* 547 P.2d at 287. Thus, the State interprets *Lange* to mean that for a condemnee to prove that marketability was substantially impaired he must show that State actions were the direct and only cause of the loss and that the State prohibited by legal restraint, the development of the property.

The State has misread the marketability requirement in *Lange.* First, *Lange* does not require the impairment of marketability to be caused by State action which prohibited development.

In determining whether marketability was impaired, the *Lange* court stated:

> The loss was a direct consequence of the State's action since after December 1969 the marketability of appellants' land was substantially impaired. The record indicates that this marketability was affected by the surveys, public announcements and hearings, followed by the purchase of a tract north of appellants' parcel in October 1969.

Lange, 547 P.2d at 287. Therefore, as *Lange* states, the impairment of marketability can be caused by State actions such as surveys, public announcements, and hearings.

Likewise, *Lange* does not require that State action be the sole cause of the impairment of marketability. Nowhere in *Lange* does the court state or imply that direct consequence is synonymous with sole proximate cause. Under Alaska law the State is liable for damages that are a proximate cause of the condemnee's loss. *Bakke v. State*, 744 P.2d 655, 656-57 (Alaska 1987). "An act or omission need not be the single producing cause of an injury to be a proximate cause, but need only be a producing cause." Id. at 656. "A finding of proximate cause is normally considered to be factual in nature. . . ." Id.

Ehrlander has submitted evidence that despite listing his property with several realtors, he received no offers to purchase the property. Ehrlander has also offered evidence of the Platting Board, of State personnel and of Conrad Frank that the cause of the impairment in marketability of his property was pending condemnation for the Geist Road Extension.

The State argues and offers evidence that the real cause of any impairment in marketability was either the Borough's denial of his subdivision approval or Ehrlander's own failure to improve his land with sewer, water and telephone service. Clearly an issue of fact exists as to whether the marketability of Ehrlander's property was substantially impaired and whether the impairment was caused by the State. Accordingly, summary judgment is not proper for either party on this issue.

C. Whether Ehrlander Took Active Steps to Develop and Sell His Property

Ehrlander has claimed that he took many active steps to develop and sell his land. He has supported this claim with evidence contained in his affidavit to that effect. The State argues that Ehrlander did not take sufficient steps to develop his property because he admitted to the Platting Board at the September 14, 1983, hearing that he had not put in the sewer, water and telephone before freeze-up. A question of fact has been raised as to whether Ehrlander took sufficient active steps to develop and sell his property.

III. WHETHER SUMMARY JUDGMENT IN FAVOR OF THE STATE BASED ON RES JUDICATA OR EQUITABLE ESTOPPEL IS PROPER.

The State has asserted that *res judicata* and equitable estoppel preclude Ehrlander from making a claim under *Lange* for an earlier valuation date. First, it is the State's position that since the valuation

date was discussed and could have been litigated in the condemnation case, Ehrlander's claim under *Lange* alleging an earlier valuation date is barred by *res judicata*. In support of this position the State cites *Klopping v. City of Whittier*, 500 P.2d 1345, 1360 (Cal. 1972):

> Since Klopping could have claimed his loss of rental income, if any, occasioned by the two precondemnation announcements in the eminent domain suit, he is barred from seeking those damages in inverse condemnation once the condemnation proceeding becomes final. "Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue *res judicata* in the other court:" *(Domestic and Foreign Pet. Co., Ltd. v. Long* (1935) 4 Cal.2d 54?, 562, 51 P.2d 73, 80; 4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, Sec. 166).

The State further argues that even if a 1983 valuation date under *Lange* was not argued in the condemnation case, that claim could have been argued. Thus, under Alaska law Ehrlander is still barred from raising the claim. "It is settled that *res judicata* precludes relitigation by the same parties, not only of claims raised in the first proceeding, but also of those relevant claims that could have been raised." *DeNardo v. State*, ?40 P.2d 453, 456 (Alaska 1987).

Second, the State has moved for summery judgment relying on equitable estoppel. Equitable estoppel requires (1) assertion of a position by conduct or words; (2) reasonable reliance thereon by an adverse party; and (3) resulting prejudice. *Great Western Sav. Bank v.*

George W. Esley Co., J.V., 778 P.2d 569, 579 (Alaska 1989). The State has alleged that in the condemnation case Ehrlander asserted the position that the valuation date would not be an issue in the inverse condemnation case. The State also claims that it reasonably relied on Ehrlander's conduct and words that April 29, 1986, was the correct valuation date. Finally, the State alleges that it would be prejudiced by the expenses of having to relitigate the valuation date.

This issue was settled by the July 3, 1991, order of the Supreme Court. This order stated in part:

> Just compensation has been established in this case by the verdict of the jury. Allowing the theory expressed in paragraph 2 of the Order of February 5, 1991, to be tried would improperly reopen the issue of just compensation. . . . The issue on retrial should be whether there was an inverse condemnation. If an inverse condemnation is found, Ehrlander is entitled to interest, but not damages, from the date of the inverse condemnation until April 29, 1986.

This order, although it does not state on what grounds, limits the compensation that would ordinarily be available to a condemnee under *Lange*. Ordinarily a plaintiff asserting a valid *Lange* claim is entitled to damages for the value of the property condemned on the date that the court determines the inverse condemnation took place. In other words, a condemnee claiming *Lange* is entitled to have the date of valuation advanced to the time when the State actually took the property rather than the date which the declaration of taking was filed.

The July 3rd Supreme Court order expressly does not allow for such damages. Rather the court has limited Ehrlander's recovery in this case to interest from the date of the inverse condemnation.

The order of the Supreme Court has already limited the damages that ordinarily would have been available to Ehrlander under *Lange*. The Supreme Court did this because it found that just compensation had already been decided at trial. Although the Court in this order did not state whether the grounds were *res judicata*, estoppel or another theory, clearly the court did limit Ehrlander's recovery because it determined that just compensation had been previously litigated and to reopen the issue would be unfair to the State. Considering that the Supreme Court has already limited Ehrlander's inverse condemnation claim because the just compensation issue was previously litigated, this court should not bar or further limit Ehrlander's claim. If the Supreme Court had wished to bar Ehrlander's claim completely because an issue had already been litigated, it could have done so. Therefore, as the Supreme Court's Order stated, Ehrlander should be entitled to interest from the time of the inverse condemnation if he is successful.

IV. IF EHRLANDER'S LANGE CLAIM IS SUCCESSFUL, WHAT ARE HIS DAMAGES

A. Whether the Value used to Compute Interest Should Include Lost Profits and Other Damages Incurred by Ehrlander

In *Ehrlander v. State, Dept. of Tranp.*, 797 P.2d 629, 636 (Alaska 1990), the court stated that "[w]hether interest should be calculated on the award already made by the jury in the condemnation trial or whether a new value should be determined for the purposes of calculating interest is a question which has not been briefed and we express no opinion on it." It is a question for this court's determination whether a new value should be determined for the purposes of calculating interest. Ehrlander has argued that should a new value be determined, he is entitled to have lost profits and other consequential damages figured into the new value.

Ehrlander is not entitled to any damages except interest should he be successful. As stated previously, the July 3, 1991, order of the Supreme Court clarified that just compensation had already been determined in the condemnation trial and that, "[i]f an inverse condemnation is found, Ehrlander is entitled to interest, but not damages. . . ."

The damages Ehrlander has requested are not available in a case such as Ehrlander's under the taking clause. The taking clause allows for damages for just compensation. in Alaska the appropriate measure of just compensation is the "fair market value" of the property. *State v. Alaska Continetal Dev. Corp.*, 630 P.2d 977 (Alaska 1980).

Ehrlander has cited to *State v. Hammer*, 550 P.2d 820 (Alaska 1976) for the proposition that he is entitled to lost profits and other consequential damages. However, *Hammer's* holding only allows for lost profits in situations where a business incurred temporary loss of profits due to relocation of the business during condemnation of the property. Id. at 827. In the case at bar, Ehrlander had no "business" operating on his land which incurred lost profits. Generally lost profits are only allowed when the State's condemnation of the realty underlying an established business causes that business to lose profits. *See Triangle, Inc, v. State* 632 P.2d 765, 794 (Alaska 1981). No Alaska case has allowed a land developer to recover lost develop meant profits caused by a taking of the property.

State v. McDonald, 656 P.2d 1043 (Wash. 1983) is a case interpreting *Lange* that is persuasive. In *McDonald* the court held in addressing a claim for lost development profits that:

> *Lange* does not in any way alter the basic rule that just compensation must relate to the value of land taken. *Lange* merely modifies the time of valuation in certain cases where that is necessary to achieve a just compensation. It does not allow a landowner to claim, under the guise of compensation, profits allegedly lost as a result of precondemnation activities of the state.

Id. at 1050. Therefore, Ehrlander is entitled to no lost development profits.

Ehrlander also is not entitled to consequential damages. Consequential damages are defined in *Hammer* as "losses to the remainder of a condemnee's property in instances of partial taking." *Hammer*, 550 P.2d at 823 n.2. Ehrlander has not claimed any damage to the remainder of his property that was not taken. Accordingly, if Ehrlander's *Lange* claim is successful he is not entitled to have lost profits or consequential damages figured into the value of the property.

B. Whether Interest Should Be Calculated on the Previous Condemnation Award or Whether a New Value Should be Used

As stated previously, the Supreme Court in *Ehrlander*, left it as an open question as to whether a new value should be determined for the purpose of calculating interest.

The State argues that the prior value of the property, as established on April 29, 1986, should be used to calculate any award of interest. The State claims that Ehrlander has waived any right to an earlier date of valuation by not protesting and allowing the jury to decide on a valuation date in the condemnation case. The State cites to *Consolidated Diking Imp. Dist. No. 3 v. Davis*, 672 P.2d 414, 416 (Wash. App. 1983), for the proposition that where the parties voluntarily had the valuation made at trial, they waived the right to have the valuation at an earlier date.

Waiver does not prohibit this court from determining a new value to calculate interest. Contrary to the State's contention,

Consolidated Diking does not involve a *Lange* claim. *Lange* is merely one of the cases that the court in *Consolidated Diking* cites as authority.

The *Lange* test itself states: "For the time of valuation to be advanced . . . ." *Lange* declares that in order to move the valuation date of the property back in time to the date when the inverse condemnation occurred, four factors must be proven. The *Lange* test was adopted by the Alaska Supreme Court to award an inverse condemnation plaintiff damages for the value of the property on the date when the state actually took the property. It seems illogical to adopt the *Lange* test and not use the test to establish the value on the date which the taking occurred, the purpose for which the test was enacted. Thus, if a valid *Lange* claim is found by the court to exist, a new value should be determined for the purpose of calculating interest.

IV. CONCLUSION

Summary judgment should not be granted in favor of either party under *Lange*. The ultimate issue of whether a valid *Lange* claim exists is a question of law for the court to decide. "It is only when a trial court concludes that the landowner has presented a valid claim that the case is submitted to the jury for a determination of the extent of the taking and the amount of compensation that must be paid by the State." *Trianagle, Inc. v.State*, 632 P.2d 965, 968 (Alaska 1981). However, many preliminary issues of fact exist that the court should decide at trial,

after a consideration of all the evidence. Genuine issues of material facts exist under *Lange* as to whether the State evidenced an unequivocal intent to take, whether the marketability of Ehrlander's property was substantially impaired and whether Ehrlander took sufficient active steps to develop and sell his property.

Summary judgment is also not proper for the State under the theories of *res judicata* or *estoppel*. The Supreme Court by order has already limited Ehrlander's claim to interest because the issue of "just compensation" has been previously determined. Ehrlander's *Lange* claim should not be limited further.

Finally, if successful, Ehrlander is entitled to interest on the value of the land at the time of the inverse condemnation. Ehrlander is not entitled to any damages including lost profit or other consequential damages.

Accordingly, both parties' motions for summary judgment based upon liability are DENIED.

DATED this 18 day of May, 1992, at Fairbanks, Alaska.

Niesje J. Steinkruger, Superior Court Judge.

THE SUPERIOR COURT FOR THE STATE OF ALASKA

Ehrlander, plaintiff,

vs.

State of Alaska, Department of Transportation and Public Facilities, defendant.

Case No. 4FA-86-2287 Civil. Judge Nisje J. Steinkruger.
Signed: June 12, 1992

ORDER ON RECONSIDERATION (Denied)

The Court, having duly considered the matters presented and being fully advised in the premises, hereby reconsiders its May 19, 1992 Order Re: Summary judgment. Accordingly, the Court holds that, as a matter of law, the requisite intent to take under the *Lange* theory as adopted by the Alaska Supreme Court is found to exist in this case as of November 14, 1983, as of December 6, 1983, and as of April 12, 1984. At trial, plaintiff Ehrlander may nonetheless present evidence establishing an earlier taking date.

In addition, the Court holds that the value upon which interest will be calculated shall include the value of the property actually taken, as well as lost profits and all other incidental and consequential damages established by Ehrlander, so long as such damages are proved to the jury with reasonable certainty.

DENIED June 12, 1992, Niesje J. Steinkruger, Superior Court Judge.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
State of Alaska, Department of Transportation and Public Facilities, defendants
Case: 4FA-86-2287 Civil

Signed: 10-14-92
Judge: Niesje J. Steinkruger

ORDER RE: STATE'S MOTION TO STRIKE PLAINTIFF'S EXPERTS AND FOR PROTECTIVE ORDER

This action involves an inverse condemnation action against the State by Ehrlander, the owner of the property. This court previously granted summary judgment in favor of the State on the inverse condemnation issue. On appeal, the Supreme Court reversed in part and remanded for a determination of whether Ehrlander could factually establish the alleged inverse condemnation pursuant to *Lange v. State*, 547 P.2d 282 (Wash. 1976), the inverse condemnation test adopted by the Alaska Supreme Court in *Ehrlander v. SOA*, the court articulated the four-part test as follows:

> For the time of valuation to be advanced, [1] marketability must be substantially impaired and [2] the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. [4] Further, the owner must have taken active steps to accomplish this purpose.

The issue set for the December trial is whether the plaintiff can demonstrate the elements of inverse condemnation as articulated in *Lange*. On August 10, 1992, the plaintiff submitted a voluminous expert

witness list. The proposed testimony of plaintiff's experts is quite varied. The expert witness list is attached hereto. The plaintiff has listed numerous witnesses in the following areas:

1. Property valuation as a subdivider;
2. Property valuation and market demand;
3. Property valuation and appraisal;
4. Economics, including economic loss and damages;
5. Economics and business, including loss and damages; and
6. Property valuation and market demand.

The State has moved to strike expert witnesses and for a protective order. The State specifically moves this court to strike the proposed property value and appraisal testimony of Sopp, Nash, Potts, Taylor, Philips, Werner, and Hoagland. Furthermore, the State has petitioned the court for a protective order preventing Ehrlander's expert witnesses from testifying and giving evidence on matters of property valuation and damages.

The State asserts that the only evidence that will be relevant and admissible at the December trial is that evidence which pertains to the four *Lange* elements. Specifically, the State argues that the property value, appraisal and damage testimony of the plaintiff's above named experts is inadmissible insofar as it does not go to demonstrating the *Lange* elements. Although Ehrlander suggests in his opposition that his expert witnesses will be used to demonstrate the "impaired

marketability" prong of *Lange*, the State alleges that this argument is without merit because Ehrlander initially listed these expert witnesses for purposes other than demonstrating the marketability prong. Furthermore, the State alleges that because Ehrlander failed to initially list these witnesses as "marketability experts," he is now precluded from using his witnesses for a purpose different than what was initially stated. The State asserts that the proposed "value" testimony would only be relevant in a trial regarding damages.

Ehrlander asserts that the expert's proposed testimony is admissible insofar as value and marketability are interrelated issues. Black's defines the terms in the following manner:

> Marketability. Salability. The probability of selling property at a specific time, price and terms.

Black's Law Dictionary 875 (5th ed. 1979).

> Valuation. The act of ascertaining the worth of a thing. The estimated worth of a thing.

Id. at 1391. From purely a definitional perspective, it appears that valuation and marketability are distinct terms. This distinction is further articulated by the Alaska Supreme Court's interpretation of marketability impairment.

> *Lange* was in the process of developing land for housing purposes when the marketability of his land was substantially impaired by a series of highway department actions leading to an announcement made on December 1, 1969 that a proposed highway would include most of *Lange's* land.

Ehrlander v. SOA, 797 P.2d 629, 634 (Alaska 1990). The *Lange* court elaborated on the elements regarding impaired marketability.

> The loss was a direct consequence of the State's action since after December 1969 the marketability of appellants' land was substantially impaired. The record indicates that this marketability was affected by the surveys, public announcements, and hearings, followed by the purchase of a tract north of appellants' parcel in October 1969 . . . The undisputed evidence indicates that after November 1969 appellants could not effectively sell the property as building sites, could not proceed with development of the property, and could not borrow money on the property. The property had no income potential, yet appellants were obligated to pay taxes.

Lange v. State of Washington, 547 P.2d 282, 287 (Wash. 1976) Marketability turns on the ability to dispose of or develop one's land. The upcoming trial is to determine whether or not a taking has occurred. If one has, subsequent proceedings may provide Ehrlander is entitled to interest only to the date of taking on the valuation previously determined by the jury or a new valuation. Valuation is not the subject of this trial. Valuation witnesses are premature. Marketability and the other three *Lange* factors are the subject of this trial. For example, Ehrlander might show impaired marketability by showing that the State's publicity regarding the condemnation made it virtually impossible for him to sell the property and/or precluded him from proceeding with development. The proposed valuation and appraisal testimony by Ehrlander's numerous experts is not relevant to demonstrating "impaired

marketability." Such testimony will go to damages. This trial is to first determine if a taking or inverse condemnation occurred.[1]

Plaintiff has given notice of his intent to call numerous experts regarding property valuation and damages. The court will not consider valuation, damages or economic loss in the December trial. The State's Motion for Protective Order excluding testimony and evidence in these areas is GRANTED.

Evidence Rule 702(b) establishes a limit of three experts on any issue. Since some of the experts plaintiff has listed on property valuation, damages or economic loss conceivably could testify as to marketability, I.e., the ability to sell or develop the property, plaintiff may have 5 days from the date of distribution of this order to file a designation of which three, if any, expert witnesses he will call on [1]

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[1] The State argues that pursuant to AS 34.60.120(3), even if Ehrlander prevails on the inverse condemnation claim, Ehrlander's evidence, concerning how the state's project influenced the value of his property, will not be admissible. AS 34.60.120 (3) provides:

> A decrease or increase in the fair market value of real property before the date of valuation caused by the public improvement for which the property is acquired or by the likelihood that the property would be acquired for the improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property . . .

The issue regarding this statute will not arise until Ehrlander is able to establish an inverse condemnation.

marketability. He shall also designate a maximum of three in any other areas of expertise and set forth the area of expertise. No new experts may be added to those listed in his August 10, 1992 Expert Witness List. The Designation of Experts and Area of Expertise shall be filed within five (5) days of distribution of this order with actual service (not mail) on defendant.

The court was unable to locate an expert witness list filed by the State.

Dated this 14 day of October, 1992, at Fairbanks Alaska.

Niesje J. Steinkruger, Superior Court Judge.

THE SUPERIOR COURT FOR THE STATE OF ALASKA

Case: 4FA-86-2287 CI
December 1992
Judge Niesje J. Steinkruger, Superior Court Judge.

Mr. John Athens State attorney.
Mr. Robert John, attorney for plaintiff.

TRIAL ON A "*LANGE* TAKING"

Transcript page 666

MR. ATHENS: But you can collect, I would say.

THE COURT: Under?

MR. ATHENS: Under the -- well Mr. Ehrlander, in the Supreme Court, tried to argue the *Klopping* theory. Now I think there are other theories that he can collect on, but the Supreme Court has said those

other theories have been waived. So, yeah, I would agree with the Court that if there is unrea . . .

THE COURT: And it's -- your position is the Supreme Court has said they've been waived because they weren't raised in the condemnation?

MR. ATHENS: Well they were waived -- the Supreme Court said they were waived because they weren't raised in the appeal, and the Court remanded only for the *Lange*, but .

THE COURT: And if I remember correctly, I ruled different than that, and that's when the Supreme Court came out with it's order and said they're waived.

MR. ATHENS: And the Supreme Court -- yes, only *Lange*.

THE COURT: So if the Court found, based upon what you're saying, if the Court found in this case that there was no unequivocal taking, but made findings that the period of time from the State's making its intent clear, say the publicized hearing for purposes of my question, until filing the application of taking, was reasonable and the landowner suffers damages during that time period by being unable to develop his land, your position is there is no provision in this providing those damages to the landowner.

MR. ATHENS: That's right. That's already been ruled on by the Supreme Court.

THE COURT: Because they didn't present that theory on appeal.

MR. ATHENS: That's right..

Continuing on page 668:

MR. JOHN: That is one of the Lange factors. I guess, your Honor, that the Klopping theory is conduct that doesn't rise to an inverse condemnation. If there's unreasonable delay in this case that rises to the level of an inverse condemnation, I believe Mr. Ehrlander would be entitled to recovery. He's not entitled . . .

THE COURT: Right, but let's assume -- you're going beyond the premise of my question. My premise of the question is, if the court finds evidence does support the four *Lange* propositions, then there is no inverse condemnation period.

MR. JOHN: I would say that there could be an inverse condemnation magnitude.

THE COURT: I don't have that anywhere. What I have is the Supreme Court saying, to find inverse condemnation, you must find the following four factors. And so my question, which I think I've figured out here, is if you don't find those factors, but you find an unreasonable delay, can damages be provided to the landowner? Mr. Athens' position is no, because the Supreme Court denied -- I mean the Supreme Court and I may disagree about this, but the Supreme Court has made it clear to me that I may not use the *Klopping* theory.

THE SUPERIOR COURT FOR THE STATE OF ALASKA

Ehrlander, plaintiff,

vs.

State of Alaska, Department of Transportation and Public Facilities, defendant.

Case No. 4FA-86-2287 Civil.
Judge Niesje J. Steinkruger.

Signed: February 2, 1993

FINDINGS OF FACT AND CONCLUSION OF LAW

This matter comes before this court as a court trial for an action in inverse condemnation by plaintiff, Lars Ehrlander ("Ehrlander"). Ehrlander was represented at trial by Robert John. The defendant, State of Alaska, Department of Transportation and Public Facilities ("DOT") was represented by John Athens. The sole issue before this court at this time is whether an inverse condemnation of Parcels A and B, as indicated on the drawing of Ehrlander's property in the appendix, occurred as alleged by the plaintiff and pursuant to the inverse condemnation requirements to be applied to this particular case in *Ehrlander v. State of Alaska, Department of Transportation and Public Facilities*, 979 P2d 629 (Alaska 1990). This court has heard the witnesses presented by both parties and considered the exhibits and arguments presented. Being fully advised, the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In June 1983, Lars Ehrlander, a builder of residential properties, learned that an approximately 24 acre parcel of land (the "property") surrounded by the City of Fairbanks (the "City") was available for purchase. The property is located near Antoinette Street and College Road in Fairbanks, Alaska, and is bordered on three sides by Noyes Slough with a railroad right-of-way to the south. At the time, the property had a three-bedroom, two-level log house on it.

2. At the time, the property was already subdivided into tax lots, and was zoned R3II by the Fairbanks North Star Borough (the "Borough") so that residential building in lot sizes of 2000 square feet or more was permitted, including multiunit complexes.

3. Being interested in purchasing the property, Ehrlander contacted the Borough about subdivision requirements. The Borough indicated that one requirement would be for the Borough to receive comments from the concerned Federal, City, and State agencies. Rather than waiting the several months which it would ordinarily take the Borough itself to solicit and receive comments, Ehrlander inquired, in late June 1983, of the several concerned federal agencies, of the City, and of several State of Alaska agencies, including the State department of Transportation and Public Facilities, to ascertain whether there were any objections to Ehrlander's subdividing the

property. All of the government entities which Ehrlander contacted indicated that they had no objection to the subdivision of the property.

4. On July 21, 1983, Ehrlander paid $1,000.00 earnest money toward the property. On August 9, 1983, Ehrlander closed the purchase of the property via $1.2 million in short-term financing.

5. At the time of purchase, the intent of Ehrlander was to subdivide and develop the entire parcel into a residential subdivision. Although at the time of purchase Ehrlander had no prior experience in developing a major residential subdivision such as was his intent with the 24 acre parcel, Ehrlander did have over 20 years experience in residential construction and contracting and had done one small subdivision project. Furthermore, the highest and best use of the 24 acre parcel was as a residential subdivision.

6. Based upon his conversations with DOT in July 1983, Ehrlander knew that the Geist Road Extension Project was being planned by DOT, and that under consideration were four alternative routes. Ehrlander also knew at the time of his purchase that at least one of the alternative routes could impact the property. In addition, Ehrlander knew at the time of his purchase that the alternative route technically preferred by DOT was a route which did not go through his property. Furthermore, based on Ehrlander's conversations with DOT

personnel, the Geist Road Extension Project, if built at all, would be built no sooner than 1987 and quite likely many years later than that.

7. Intending to develop the entire property and then sell it as soon as reasonably possible, commencing in July 1983, Ehrlander obtained the above-mentioned short term financing, awarded contracts to install the roads, sewer, water, a bridge, and other infrastructure, had the entire property annexed to the City of Fairbanks, and obtained a 5500,000.00 performance bond for the City of Fairbanks to insure that the improvements would be completed. In addition, Ehrlander employed Ellerbe Alaska, Inc. ("Ellerbe") to prepare a plat for the 24-acre subdivision to be known as Royal Court Village, which plat Ellerbe promptly prepared.

8. On or about August 12, 1983, Ehrlander submitted a subdivision request to the Fairbanks North Star Borough for Royal Court Village. Ehrlander had previously contacted persons at DOT, only two to three weeks prior, who indicated that DOT did not foresee any problem with Ehrlander developing the property, and that DOT had long term plans for the Geist Road Extension but nothing in the near future. However, on or about August 4, 1983, without informing Ehrlander, DOT filed an application with the Borough to amend the Borough's Comprehensive Plan to show four alternatives for

the 200 foot right-of-way for the Geist Road Extension, three of which would pass through Ehrlander's proposed subdivision.

9. On August 15, 1983, Ehrlander's request to annex the property to the City was first heard by the City Council. The annexation agreement between Ehrlander and the City essentially required that Ehrlander would receive City utilities when Ehrlander had improved the entire property to the City's standards, at which time the City would assume ownership of the improvements. The agreement received final City approval on September 17, 1983.

10. A hearing on Ehrlander's subdivision was scheduled for August 24, 1983, before the Borough Platting Board. Prior to the August 24 hearing, a series of meetings occurred between representatives for Ehrlander, DOT, and the Borough, with the State indicating that it would use advance acquisition to acquire Ehrlander's property if the route chosen for the Geist Road Extension went through his property. Correspondingly, on August 18, 1983, DOT on a form submitted to the Borough gave DOT's standard "no objection" response to Ehrlander's proposed subdivision; however on the same form DOT commented and clarified to the Borough DOT's desire that if Ehrlander's subdivision did not break ground until 1984, the State would know which right-of-way the State would need for the Gist Road Extension. In addition, prior to the

August 24, 1983 hearing, the State superimposed on Ehrlander's subdivision plat linea indicating the path of the Geist Road Extension routes going through Ehrlander's property.

11. At the August 24, 1983 meeting of the Borough Platting Board, DOT's comments and superimposed Geist Road Extension route, a: well as the matters set forth in the above paragraph were presented to the Platting Board, including that there would be a joint State and Borough public hearing on the Geist Road Extension, after which the State would utilize advance acquisition to acquire Ehrlander's property. Based on such considerations, the Platting Board only approved Ehrlander's subdivision request in part, denying it with respect to the area encompassing the potential Geist Road Extension route which the State had superimposed on the plat and with respect to an area which needed to be replatted due to the Geist Road Extension part of the subdivision being denied.

12. At a meeting at DOT on or about August 29, 1983, DOT informed the Borough Platting Officer, Herb Mann, and Ehrlander's representatives that if the route through Ehrlander's property was chosen, the actual location of the Geist Road Extension would be determined by field survey and would be no further north than the red line designating the northernmost boundary of the right-of-way, which DOT had drawn on Ehrlander's

plat. At the meeting, the State also indicated that if the centerline of the Geist Road Extension property did shift to the south, that shift would be no more than 100 feet so that the road would still be entirely within Ehrlander's property. The reason that any shift in the location of the road through Ehrlander's property would be minimal was that the Geist Road Extension had a fixed point because it would be-passing somewhere between Noyes Slough and the railroad right-of-way, and the only property between the Noyes Slough and the railroad right-of-way was Ehrlander's.

13. On September 14, 1983, the Borough Platting Board reconsidered its August 24, 1983 decision to partially approve and partially deny Ehrlander's subdivision request. In between the August 24 and September 14 meetings, Ehrlander contacted the State and requested that the State definitely indicate exactly which of Ehrlander's property it would need for the Geist Road Extension so that the Borough would more likely approve those areas of the proposed subdivision not likely to be affected by the proposed road. In response to Ehrlander's request, the State submitted several letters to the Borough concerning the Geist Road Extension and Ehrlander's property. In a letter dated August 29, 1983, the State confirmed its commitment to the Geist Road Extension, and it indicated since there was only a degree of uncertainty in the exact location of the

right-of-way, the red line superimposed on Ehrlander's subdivision plat by DOT designated the northern limit for the Geist Road Extension. This designation by the State established their firm commitment that if the route chosen after the public hearing was the one through Ehrlander's property, then the road would not be built north of this designated red line. This meant that any development north of this line would not be physically displaced by the road. This line is approximately reflected on the appendix as the line between Section A and Section H. In a letter dated September 6, 1983, the State reiterated that advance acquisition of Ehrlander's property was the process the State wanted to use once a specific alternative as to the route was chosen. On September 12, 1983, the State wrote a letter to the Borough recommending phase development of Ehrlander's subdivision in conjunction with the Geist Road Extension. In other words, the State suggested to the Borough that it only allow development north of the proposed routes until the route location was determined or, if the builder did not agree, then require a note on the plat to warn potential buyers of the proposed routes.

14. Ehrlander, who had been in Sweden on a family emergency at the time of the August 24, 1983 hearing, returned to Alaska in September 1983. On September 12, 1983, Ehrlander met with Stephen Sisk, DOT's Design Chief for the Northern Region, and

reiterated the hardship he would suffer if he were unable to market his property due to the property being earmarked for the Geist Road Extension. At the meeting, Sisk confirmed that DOT intended to use the advance acquisition program to acquire Ehrlander's property if the route went through his property and that acquisition would occur in the summer of 1984.

15. At the September 14, 1983, Borough Platting Board hearing, except for granting Ehrlander subdivision approval for only two more lots, the Platting Board affirmed its August 24, 1983 decision. This meant that Ehrlander could only subdivide and sell the area in "white" on the appendix designated as "Subdivision Approved August 1983."

16. On or about September 19, 1983, Ehrlander contacted Janice Wagner of DOT and asked that DOT rescind its September 12, 1983, comment recommending phase development. After discussing the matter with her supervisor, Wagner contacted Ehrlander and informed him that DOT intended that the Borough rely on the comments DOT had submitted and that DOT would not rescind its phase development recommendation.

17. On October 19, 1983, DOT and the Borough held their joint public hearing on the proposed routes for the Geist Road Extension. Prior to the hearing, the Geist Road Extension Project was extremely well publicized by the State through the newspaper and other

means of advertising, as well as individually contacting those, such as Ehrlander, whose properties were in the target zone of the alternative routes. This action was an action by the State and Borough to provide for public input on which proposed route was best considering land use, environmental and historical factors, location and access. Accordingly, the October 19, 1983, public hearing was the most well-attended road location hearing in the history of the Fairbanks area.

18. At the October 19, 1983, public hearing, there was a public outcry against the only route which would have bypassed Ehrlander's property and which would have gone instead to the Monroe High School area and bisected the Monroe High School property. The public strongly resisted this route which was technically preferred by DOT and the public testimony at the hearing strongly favored one of the routes going through Ehrlander's property.

19. At the public hearing on October 19, 1983, Ehrlander testified that he was in favor of the alternative route going through his property. Ehrlander's testimony was based on two considerations. First, like the rest of the public, Ehrlander did not like the Geist Road Extension alternative route which would have bisected the property of Monroe High School. Ehrlander's second consideration when testifying at the public hearing was that DOT had told Ehrlander that if one of the Geist Road Extension routes going through his property

were selected by the State as a result of the public hearing, the State would then utilize an expedited acquisition process to purchase the property for fair market value. Such an expedited purchase was acceptable to Ehrlander because it was his intention to sell all the property in 1984. Thus, whether Ehrlander sold the property to the State or to a private purchaser in 1984, in either event he would satisfy the demands of development loans he had incurred and would realize the economic advantages of his property and the investment therein.

20. On or about November 14, 1983, DOT wrote to the Borough and indicated that, as a result of the October 19, 1983 public hearing, DOT had selected the 2-C/Cl Geist Road Extension route, the Cl segment of that route being the one going through Ehrlander's property. Accordingly, DOT requested that the Borough Planning Commission approve this route selection, such local planning approval being generally required under AS 35.30.010 et seq. This letter was the first designation by the State that the route through Ehrlander's property designated C1 would be the route built. Although the actual location on the ground might shift when deigned and surveyed, the route would go through Ehrlander's property at or slightly south of the red line the State had designated as the northern limit, as depicted in the line between Section A and Section B in the appendix.

21. The evidence establishes that at no time after selecting the 2-C/Cl route on November 14, 1983, did the State ever realistically consider any of the other routes or the "no build" alternative for the project. DOT later proceeded to design and build on the 2-C/Cl route as well as the connecting segments.

22. On December 6, 1983, the Borough Planning Commission unanimously recommended the State's selection of the Geist Road Extension route going through Ehrlander's property. This meant that the Borough agreed with the State's designated route. Subsequently, on April 12, 1984, the Borough Assembly recommended the State's selection of the Geist Road Extension route going through Ehrlander's property. These actions by the State and Borough left no doubt to a reasonable person that the State had committed to building a portion of the Geist Road Extension through Ehrlander's property in the near future with the support and concurrence of the Borough. The State repeatedly stated to Ehrlander and the Borough that it anticipated beginning the acquisition process for Mr. Ehrlander's property in the Fall of 1984.

23. In late 1983 or early 1984, DOT personally gave Ehrlander a copy of the booklet "Coming Your Way", which booklet DOT gives to persons whose property it has determined to acquire for highway purposes and to persons interested in the process.

24. In early 1984, Ehrlander commenced preparing a second subdivision request. It was for the remaining property, which the Borough had denied subdivision of in August and September 1983 and, which DOT had stated would not be acquired for the Geist Road Extension. No later than March of 1984, Ehrlander, through Karen Tilton of Ellerbe, had prepared an initial plat for his second subdivision which was to be known as Royal Court Village, First Addition. Had the State not selected the route going through Ehrlander's property and otherwise firmly indicated its intent to acquire Ehrlander's property, he would have prepared a plat along the lines of his original August 1983 plat which would have included Section A and Section B of the appendix, and would have proceeded to request full subdivision approval.

25. On May 11, 1984, Ehrlander spoke with Assistant City Engineer Gerald Colp, concerning the installation of utilities in the Royal Court Village, First Addition. Colp indicated to Ehrlander that the City wanted a firm indication from the Department of Transportation on the location of the Geist Road Extension. Later that day Ehrlander went to DOT and conveyed Colp's concerns. In response to this request from Lars Ehrlander, DOT wrote to the City on May 11, 1984, indicating that Ehrlander should be permitted to install his utilities

which had been redesigned to accommodate the Geist Road Extension going through his property.

26. During the course of completing the Royal Court Village, First Addition in 1984, Karen Tilton had numerous contacts with DOT personnel. In one or more of these contacts DOT indicated to Tilton that her plat would determine the legal boundaries, the numerical curve and distance specifications, for the portion of the Geist Road Extension passing through Ehrlander's property. Accordingly, Tilton incorporated specific curve and distance specifications in the plat of the First Addition, which she was preparing in 1984, with input from DOT. The State had drawn a line, the line between Section A and Section B of the appendix, back in August 1983 and told the Borough and Ehrlander that the road corridor would not go north of that line. However, even with the line, the Borough had still refused to approve Section A for subdivision when it approved its neighbor, the Royal Court Village in September 1983. Between September 1983, when the Borough denied subdivision of what became known as Section A and Section B, and the Spring of 1984, the State reinforced its commitment to this line being the northern edge of the right-of-way road corridor by securing the designation of the Fairbanks North Star Borough Assembly of the road location in its Comprehensive Plan. In addition, when Mr. Ehrlander replatted Section A, Royal Court

Village, First Addition, to try and secure subdivision approval from the Borough he sought approval from DOT as to the metes and bounds description of the southern boundary of the lots as it would serve as the northern boundary of the right-of-way. In preparing the plat Ellerbe and DOT came to an agreement about the degree of curve, DOT reviewed more than one preliminary plat and on September 19, 1984, sent a final letter to Ellerbe approving the specific property line for the south boundary of the subdivision as the northern line beyond which DOT would not go. In reality, the testimony established that both DOT and Ellerbe knew they were designating the exact location of the right-of-way which is why DOT and Ellerbe both worked so hard to clarify the exact curve and location of the southern boundary of the First Addition. The Geist Road Extension, as eventually constructed in 1990, substantially corresponds with the specifications provided by Ellerbe and prepared with input and acceptance by DOT.

27. As a result of having to accommodate the Geist Road Extension going through his property, Ehrlander was required to redesign the utilities and other infrastructure. As such, the $500,000.o0 performance bond which Ehrlander posted in 1983 was insufficient to cover the First Addition because Ehrlander had to incur additional expenses and take additional time associated with replatting and redesigning the property, utilities, and infrastructure.

28. By September 1984, except for minimal additional road surfacing and minor matters such as painting fire hydrants, Ehrlander had completed the utilities and improvements in and on the property which DOT formally condemned on April 29, 1986, (that area shown on the appendix as Section B), and the First Addition (Section A), and submitted the plat for Borough approval in September 1984. In response, on September 19, 1984, DOT again notified Ehrlander that the subdivision would not have access to the Geist Road Extension. DOT reiterated the same to the Borough via a Land Use Review and Comment on September 25, 1984.

29. The Borough Platting Board approved Ehrlander's preliminary plat on October 24, 1984 and his final plat in March 1985 for the Royal Court village, First Addition, Section A of the appendix.

30. Even though DOT had expressly indicated that it would be utilizing an expedited or advance acquisition process to acquire Ehrlander's property in 198□, DOT did not follow through on its promise. DOT asserts that it simply took longer to do the Environmental Impact Study and Design work than anticipated. Instead, when Ehrlander contacted DOT personnel on numerous occasions in 1984 and 1985, informing DOT that he was suffering hardship and asking when advanced acquisition of his property would occur, DOT kept telling Ehrlander that advanced acquisition would be

forthcoming, but that it would be later than previously indicated. Eventually, on June 23, 1985, Ehrlander spoke with Stephen Sisk, DOT Design Chief for the Northern Region. At the time, Sisk, indicated to Ehrlander that all that DOT had been waiting for was a written request from Ehrlander to initiate the advance acquisition of Ehrlander's property. DOT's advance acquisition regulations themselves do not require such n written request from the landowner, and the June 23, 1985 meeting between Sisk and Ehrlander was the first time that DOT informed Ehrlander that Ehrlander needed to make a written request before DOT would begin formally acquiring his property on an expedited basis. If DOT had ever told Ehrlander that his numerous personal meetings and oral requests for advance acquisition were inadequate from 1983-1985 and that DOT required a written request he would have immediately put his request for their promised advance acquisition process in writing.

31. On June 4, 1985, the day following Ehrlander's meeting with Stephen Sisk, Ehrlander personally delivered to Sisk a letter requesting that DOT acquire Ehrlander's property on an expedited basis due to the hardship he was encountering in being unable to market the property. On July 3, 1985, Sisk wrote a letter to the Federal Highway Administration requesting the advance acquisition of Ehrlander's

property. The FHA approved DOT's request on July 19, 1985, only 13 days after it was sent.

32. During 1984 and early 1985, DOT was required by the FHA to do a detailed historical analysis of the "C" segment of the project, that segment concerning the Illinois Street area. While it appears that in 1983 DOT did not anticipate having to do such an analysis, the historical controversy concerning the Illinois Street area did not involve that segment of the project which crossed Ehrlander's property, the "C1" segment, which did not encounter any significant historical or environmental controversy. There had been some minor environmental controversy at the Borough subdivision level about GVEA noise and Ehrlander's property but this was unrelated to the State's project. As of the end of 1992, construction of the Illinois Street area segment, the "C" segment, has not occurred and may never occur due to various ongoing environmental problems with the segment.

33. On May 13, 1985, DOT requested FHA approval of the 2-C/Cl route. On July 31, 1985, DOT received location approval for the 2-C/Cl route from the FHA.

34. Between July 19, 1986, when DOT began the advance acquisition process for Ehrlander's property and April 29, 1986, when the Notice of Taking was filed as to Section B in the appendix, the State proceeded to request and obtain appraisals of Ehrlander's land,

grant extensions for appraisals, have the appraisals internally reviewed and then enter into negotiations with Ehrlander. Eventually, when no agreement resulted, the State filed a Notice of Taking for a condemnation court action.

35. On April 29, 1986, DOT formally condemned Ehrlander's property, essentially taking all Ehrlander's property south of Royal Court Village, First Addition. This area encompasses the road and the property left without access on the south side of the road, Section B of the appendix.

36. From July 1983 through April 29, 1986, Ehrlander took various steps to market all the property which he originally sought to subdivide in 1983, both that property which he subdivided and that which the State formally condemned on April 29, 1986. The Borough had approved Royal Court village in 1983 and Ehrlander proceeded to sell those lots. This is the area in white on the appendix. At the same time, the Borough denied subdivision of the remaining areas, marked Section A, in black and Section B, in gray, on the appendix. Even though DOT drew a line, the red line or northerly limit of the right-of-way if the road was built on Ehrlander's property, the Borough still declined subdivision of the area the State indicated would be unaffected, the area shown in black, Section A, what eventually became the First Addition to Royal Court Village.

37. During the Spring of 1984, Ehrlander sought to obtain financing for the property. In June 1984, Ehrlander bought out his partner, James Lundgren, and restructured the loan in the amount of $1.8 million. One week later, on June 12, 1984, Ehrlander obtained an additional loan in the amount o! $800,000.0o for the construction of four-plexes on the property.

38. When the Borough considered Ehrlander's request for subdivision of all of his land in August and September 1983, DOT had not yet determined which route the Geist Road Extension would take and whether or not it would go through Ehrlander's property. This uncertainty caused the Borough to deny Ehrlander approval not only for the land the State said might be affected, Section B in the appendix, but the Borough also denied Section A. The Borough invited Ehrlander to return in the Spring of 1984 to request further subdivision approval, as by then it was anticipated the route would be chosen. By then, public testimony and DOT work would have progressed such that DOT would have selected a route. This is exactly what did happen. On November 14, 1983, DOT indicated to the Borough it had chosen the route through Ehrlander's property and invited the Borough to concur in the location designation. Therefore, by the Spring of 1984 it was clear to everyone that Section B would contain the right-of-way for the Geist Road Extension and Section A would

not. Therefore, Ehrlander proceeded to replat Section A around the Geist Road Extension with input and approval from DOT as set forth in paragraph 26 above. After the designation o! the route and the location of the right-of-way became generally fixed the land in Section B that was not part of the road became unmarketable and of no value for Ehrlander's use, that is, to develop and sell. It had no access, and DOT had clearly said numerous tines this subdivision would not have direct access to the Geist Road Extension. Section A became the Royal Court Village, First Addition, after preliminary approval by the Borough on October 24, 1984, and final plat approval in March 1985.

39. From 1984 until April 29, 1986, Ehrlander sold nearly all the property which the State indicated it would not be acquiring for the Geist Road Extension, this being Royal Court Village and Royal Court Village, First Addition. The sales were primarily multiple lot sales to builders by Ehrlander's personal efforts or by relators who had the property listed.

40. As to that property which the State indicated it would be acquiring for the Geist Road Extension -- that property which the State formally condemned in 1986 - after the platting of the First Addition in 1984, the property remained subdivided into four separate tax lots ranging in size from 1/2 acre to 2.5 acres (Section B). These tax lots

were of the same size and were improved to the same extent as Ehrlander's typical sale in Royal Court village or Royal Court village, First Addition. Ehrlander was legally entitled to sell the tax lots without further Borough action.

41. As to that property which the State indicated ft would be acquiring for the Geist Road Extension -- that property which the State formally condemned in 1986 - Ehrlander marketed that property through his own personal efforts, including personally contacting nearly all the residential builders in the Fairbanks area. The relators who had the Royal Court Village and Royal Court Village, First Addition lots listed for sale for Ehrlander also knew that he wanted to sell the area that the State would take and would market it to a buyer although their opinions were that it was unmarketable because of the State action to build the Geist Road Extension and the lack of access. Despite thus marketing the property, which the State had indicated it would be acquiring for the Geist Road Extension, Ehrlander received no offers to purchase that property or any portion thereof, and accordingly had sold none of the property between 1983 and April 29, 1986.

42. In addition, on one occasion between late 1983 and early 1986, Ehrlander spoke with Conrad Frank of New State Land, Inc. ("New State Land"), his father-in-law and a member o! the real estate investment group, New State Land. Ehrlander asked Frank if his group

would be interested in making an offer to purchase that property which the State eventually formally condemned in 1986. After speaking with other investors of New State Land, Frank informed Ehrlander that due to the State indications that it would be acquiring the property for the Geist Road Extension, New State Land would not be interested in making an offer to purchase that property as they deemed it unmarketable because of the State decision to build the Geist Road extension on it.

43. The property of Ehrlander's which the State formally condemned in 1986 was exactly the same property which the State indicated on Ehrlander's 1983 subdivision plat would be required for the Geist Road Extension.

44. The property south of the Geist Road Extension, Section B on the appendix, had no access unless DOT granted access to the Geist Road Extension.

45. The State did not show an unequivocal intention to acquire Ehrlander's property which later comprised Royal Court Village, First Addition, Section A on the appendix, for the Geist Road Extension. To the contrary, as early as August 29, 1983, DOT clearly communicated by letter to the Borough and Ehrlander that if the road went through Ehrlander's property it would not go north of the red line DOT drew on the plat, what became the southern boundary of the

Royal Court Village, First Addition. Any delay or decline in marketability as to the First Addition occurred for other reasons, the Borough's refusal of subdivision approval, the need for replatting, or the lack of funds by Ehrlander.

46. A number of steps piece by piece, led up to an unequivocal intent by the State to acquire the area south of the red line, Section B of the appendix, for the Geist Road Extension. As early as August 1983, the State drew the red line which divides Sections A and B and committed to going no farther north. It held a public hearing and designated its choice, the route through Ehrlander's property, the northern border being the red line. DOT sought and obtained the Borough's acceptance of this route in its Comprehensive Plan. DOT proceeded with environmental, historical and design analysis and planning for this designated routs. It is the finding of this court that DOT's unequivocal intent to take Section B of Ehrlander's property culminated on September 14, 1984. Throughout the Spring and Summer of 1984, DOT worked with Ellerbe to designate on a plat specifically what the location of the southern boundary of the lots in the Royal Court Village, First Addition (Section A on the appendix), would be. As set forth in paragraph 26 above, DOT invested this effort in designating the boundary because they were committed to using the same location description as the northern boundary of the right-of-way

for the Geist Road Extension. Although DOT took many steps towards this final designation, it has been established by clear and convincing evidence that an unequivocal intent to take occurred by September 14, 1984, when DOT advised Ehrlander, through Ellerbe, that the plat met with DOT's approval. This is further detailed in paragraphs 4 and 5 of the Conclusion: of Law.

Conclusion of Law

Now, therefore, based upon the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. Article I, S 18 of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." This constitutional provision "is to be interpreted liberally in favor of the property owner." *Ehrlander v. State, Department of Transportation and Public Facilities,* 797 P2d 629, 633 (Alaska 1990). As such, the Constitution requires the State to treat its condemnees "with the utmost fairness," *22,747 Square Feet, More or Less v. State,* 799 P.2d ?77, 779 (Alaska 1990); *Kasnick v. SOA,* 799 P.2d 777 (Alaska 1990), and to fully indemnity them for any taking, *State v. Doyle,* 735 P2d 733, 736 (Alaska 1987). The purpose of the constitutional provision is thus "to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects

intended to benefit the public generally, *DeLisio v. Alaska Superior Court*, 740 P2d 437, 439 (Alaska 1987).

2. In this case, the Alaska Supreme Court has held that a taking occurs "whenever a property owner is, by reason of an impending condemnation, deprived of the economic advantage of ownership," *Ehrlander*, 797 P.2d at 635, such as where an impending condemnation substantially impairs the marketability of the person's property, id. at 634-35. The Alaska Supreme Court has adopted the four-part test enunciated in *Lange v. State*, 547 P.2d 282, 288 [Wash. 1976):

> For the time of valuation to be advanced, [1] marketability must be substantially impaired and [2] the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. [3] The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. [4] Further, the owner must have taken active stops to accomplish this purpose.

Ehrlander, 797 P.2d at 634.

3. The *Lange* test derives from a long line of authorities which recognize that public knowledge that a particular property is subject to future condemnation tends to cause a blight on the value and marketability of that property, especially where one has purchased land with the sole objective of developing and marketing that land for residential purposes. *See Lange*, 547 P2d at 284-88. The *Lange* court analogized one in such a position to a store owner who is stuck with an

inventory of unmarketable goods. See id. at 287-88. The *Lange* recovery is limited only to property whose owner's purpose was development and sale of the land.

4. In looking at the four part test of *Lange*, as adopted by the Alaska Supreme Court in Ehrlander, this court finds that all elements have been met as to the property eventually condemned by the State, Section B of the appendix. [1) Marketability must be substantially impaired: Ehrlander made efforts to sell the land and he and relators testified it was unmarketable because of the impending road and the resulting lack of access. [2) The condemning authority must have evidenced an unequivocal intention to take the specific parcel of land: The State moved one step at a time with each step being a building block until it was clear to a reasonable person that the Geist Road Extension was going through Ehrlander's property. The State argues that all steps are "preliminary" until they receives final location approval from FHA. In this particular case, the State clearly evidenced an unequivocal intention to take Ehrlander's property for the Geist Road Extension by September 14, 1984. It had substantially completed public input, it had communicated the northerly limit to the Borough, it had held public hearings, it had made "no access' determinations, it had worked out a metes and bounds location with Ehrlander for the southerly limit of the Royal Court Village, First

Addition, which would abut the Geist Road Extension, it had repeatedly explained to the Borough and Ehrlander that the project would be going in 1984 and it had repeatedly stated it would use advance acquisition for Ehrlander's property. It was clear to the Borough, to Herb Mann, to Ehrlander, to Ellerbe, to the relators in the community and to DOT that the road was going to bisect Ehrlander's property at the southerly edge of the First Addition. The road was eventually built in 1990 in that location. Granted, the road might eventually be a few feet different from place to place than originally drawn. But, after September 14, 1984, there was no doubt where it was going, only when it was going. The approval of FHA may have been necessary for funding of an eventual taking but in this particular case Ehrlander has established by clear and convincing evidence that the State unequivocally intended to condemn the land ft did by its actions and representations taken together between July 1983 and September 14, 1984. [3) The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale: The State does not dispute this element. Clearly, development and sale was Ehrlander's sole purpose in using the land. [4) The owner must have taken active steps to accomplish this purpose: Ehrlander aggressively and actively constructed improvements in the proposed subdivision as a whole and on the land eventually

condemned by the State by way of roads, a bridge, sewers, dirt work, and utilities.

5. The intent to take element in the *Lange* test looks for firm statements or other expressions of the condemnor's intent to acquire the landowner's property. *See Ehrlander*, 797 P2d at 635 nn. 16-17; *see also Homeward Bound. Inc. v. Anchorage School District*, 791 P.2d 610, 614-15 [Alaska 1990). A property owner is entitled to rely on the State's representations of its intent. *Grant v. State*, 560 P.2d 36, 39-40 (Alaska 1977). When Ehrlander first went to the State in July 1983 prior to buying the land he was shown a map with four alternate routes for the Geist Road Extension, three through the property he was considering buying. He was told the project had been in study for many years with no plans by DOT to proceed in the near future. Ehrlander purchased the land to develop and subdivide. Simultaneously, DOT placed the wheels in gear to proceed with the Geist Road Extension plans by doing the public input and planning process to designate a route. This occurred with a fury from, August through November 1983 by application by DOT to amend the comprehensive plan of the Borough, by frequent meetings and communication between Ehrlander, Ellerbe, the Borough and DOT and by the public input by written comments and public hearing. In this particular project this process was for the purpose of designating a

route. The process culminated on September 14, 1984, when a reasonable person knew, as did DOT, Ellerbe, Ehrlander, the Borough and local relators, that the Geist Road Extension was going through Ehrlander's property. The State had evidenced an unequivocal intent to take in this particular case by its cumulative actions after the public input and planning process, by doing a final selection of which of the four proposed routes it would use, by designating the northern limit of the route in more and more specific terms until September 14, 1984, when DOT approved the plat for the Royal Court Village, First Addition, including the property description for the subdivision southern boundary which DOT specifically assisted in designating so it would accommodate the adjacent road the State unequivocally intended to build.

6. The Alaska Constitution, Article I, S 18 provides that private property shall not be taken or damaged for public use without just compensation. With no bad motive, DOT took the land it eventually condemned, Section B on the appendix, by a series of steps which resulted in the property being unmarketable after a reasonable person could clearly conclude DOT unequivocally intended to take the land. The public, the Borough, the relators, Ehrlander, Ellerbe and DOT clearly knew by the numerous statements and actions taken by DOT that the Geist Road Extension was going through Ehrlander's

property, that the northern boundary of the right-of-way was going to be approximately within a few feet of the southern boundary of the Royal Court Village, First Addition. DOT designated this location by a red line to the Borough in August 1983 when four routes were still being considered. DOT chose this route after public hearing in November 1983 and urged the Borough to join in the designation which the Borough did in April 1984. From November 1983 to September 1984 DOT proceeded to meet federal environmental and design requirements all the while assuring Ehrlander they would use advance acquisition. By September 14,1984, when DOT agreed to the metes and bounds description surveyed and prepared by Ellerbe an unequivocal intent to take was obvious. Lars Ehrlander is entitled to be compensated for the public's taking of this land, Section B on the appendix, from September 14, 1984. The project of building an east/west access road connecting the Parks Highway and the Steese Highway was a project to benefit many. Our Constitution ensures that no individual should unfairly bear the cost of such a project without compensation. Lars Ehrlander was deprived of the use of this property from September 14, 1984, the use being to sell the property he had developed. Therefore, he shall be compensated for the period September 14, 1984 to April 86, 1986, the date of the Notice of Taking

and date from which the jury has awarded damages in the condemnation case.

7. As set forth in Finding of Fact number 45, DOT did not show an unequivocal intent to ever take the Royal Court Village, First Addition, Section A of the appendix. To the contrary, as early as August 29, 1983, DOT committed to the Borough that the Geist Road Extension would not go through Section A. Any inability to market Section A was the result of other factors or actions by other than DOT.

8. This court has found an inverse condemnation of the land eventually condemned by the State, Section B on the appendix. In *Ehrlander v. State, Department of Transportation*, 797 P.2d 629 (Alaska 1990) the court directed:

> In the event that an inverse condemnation is found interest should run from the date of the inverse condemnation until April 29, 1986. Whether interest should be calculated on the award already made by the jury in the condemnation trial or whether n new value should be determined for the purpose of calculating interest is a question which has not been briefed and we express no opinion on it.

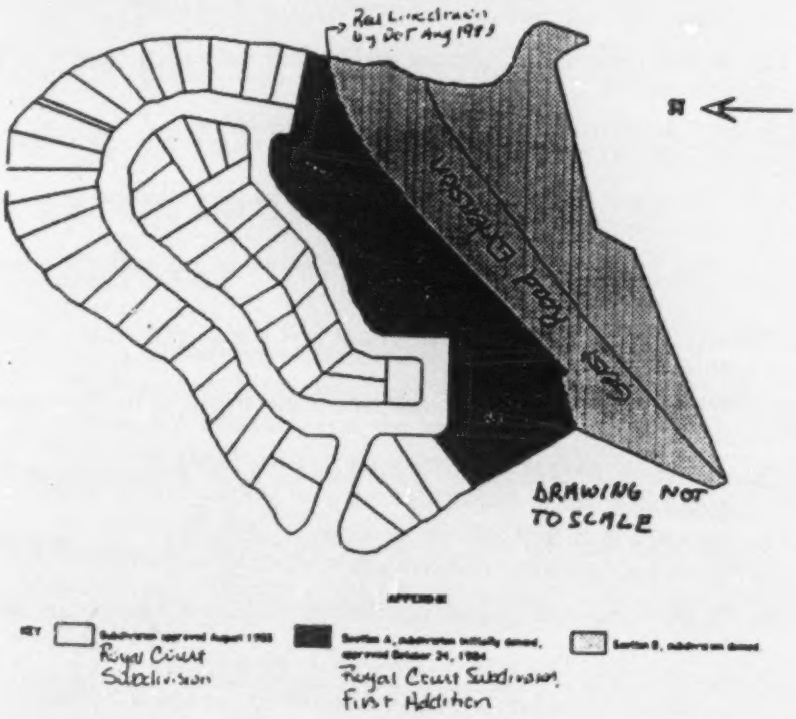
If the parties are unable to agree as to the damage judgment amount for this inverse condemnation the following procedure shall be followed. Within 45 days of the date of distribution of this pleading Ehrlander shall file a motion for judgment as to damages setting forth which of the two methods referred to above by the Supreme Court should be

followed in this case and how it should be implemented. Twenty (20) days later the State may file an Opposition and five (5) days later Ehrlander may file a Reply. Ehrlander's Memorandum and the State's Opposition may not exceed 10 pages, the Reply may not extend 5 pages. Each party's pleadings shall include a mathematical calculation of the judgment amount if the court adopts the method of calculating interest on the award already made by the jury in the condemnation trial. Each party shall lodge a proposed judgment.

DATED this 2 day of February, 1993, at Fairbanks, Alaska.

Niesje J. Steinkruger, Superior Court Judge

APPENDIX



THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
State of Alaska, Department of Transportation and Public Facilities, defendants

Case: 4FA-86-2287 Civil
Signed: 5-25-94
Judge: Niesje J. Steinkruger

AMENDED ORDER RE: FEES AND COSTS

[as to Paragraph 3(b)

This matter comes before the court on cross motion for attorney fees.

1. The parties have filed cross motions for cost and cost bills. The undersigned requested that the Clerk of Court withhold ruling on costs until the court determined who was the prevailing party. This court has found plaintiff Ehrlander to be the prevailing party and, therefore, the Clerk shall proceed to schedule a cost hearing.

2. This court finds that plaintiff, Lawyers [sic] Ehrlander, is the prevailing party in this action for inverse condemnation under a *Lange* taking theory. This litigation has continued fore some nine years alleging that the State took more land than it identified in its Notice of Taking and jury trial in Case No. 4FA-86-886 Civil and the State actually "took" land earlier than the date of its Notice of Taking. The original claims of the plaintiff were against not only the State of Alaska but also the Fairbanks North Star Borough. Following settlement on the eve of

the first scheduled trial in 1988 with the FNSB, summary judgment was granted to the State and an appeal followed in *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990). The Alaska Supreme Court allowed the *Lange* claim by the plaintiff and remanded the case for trial on those claims. Thereafter, by Order S-4460/S-4508, July 21, 1991 (attached), the supreme court clarified that the only claim plaintiff could assert was a *Lange* taking. Trial took place regarding a *Lange* taking as to Section A and Section B for inverse condemnation and Ehrlander prevailed as to Section B, receiving interest damages as instructed in *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990) and a judgment of $204,279.47

3. Ehrlander claims attorney fees of $204,114. The general rule of attorney fees in inverse condemnation is that the condemnee receives full cost and attorney fees. Alaska R. Civ. P. 72(k). However, this court finds that an appropriate award of attorney fees is $153,085.50, which is 75% of the actual fees. The reasons the court has chosen not to grant full fees are as follows.

a. A substantial portion of the fees incurred prior to settlement with the Borough were Ehrlander's claims against the Borough, not the State. While some of the issues overlapped, large portions of discovery expenses and motion expenses related primarily to the actions by the Borough and Ehrlander's claims that the Borough wrongfully denied him subdivision approval resulting in damages owed to him. A partial reduction is appropriate for these fees.

b. A substantial portion of Ehrlander's pretrial motions following remand from the Supreme Court in 1990 and his presentation at trial were spent asserting

that he was entitled to a new square foot value because the jury in the underlying condemnation case had to have been wrong. The pretrial and trial work through the trial of December 1992 related primarily to whether the State had inversely condemned Section A and Section B of Ehrlander's property as he alleged. The court had ordered that the trial in December of 1992 would be solely to determine if a taking had occurred. If not taking occurred, no further issue regarding method of calculating damages was necessary. If a taking did occur, then the court would determine whether a square foot new valuation should be set by jury trial and interest awarded on that valuation; or if interest should be calculated based on the square foot valuation determined by the jury in the earlier trial. At the earlier trial, the jury had accepted the state's valuation of $1.79 per square foot as the reasonable value at the date of taking. However, Ehrlander continued to present (by motion and evidence) at trial in December of 1992 claims for lost profits, financing expenses and other claim which were not the subject of the remand at that point. Only the taking issue was being tried. Throughout Motions, Ehrlander attempted to get the court to vacate the award in the original condemnation and retry it setting the higher $5.00 per square foot value he advocated at trial and lost on. These subsequent motions and evidence were the subject of litigation on remand, not a retrial of the earlier condemnation. This matter was to be addressed after the court made a determination of whether Ehrlander established an inverse condemnation. The court has considered that by Summary Judgment dated May 19, 1992, it stated that a new value should be determined for the purpose of calculating interest. However, this was not the subject at issue in the trial, the taking was the subject at issue; and Ehrlander continued to try the case as if a new valuation was being set at trial and the earlier valuation set by the jury was vacated. In addition, Ehrlander continued to present lost profit and other claims that were not the subject of the trial and had previously been ruled on by the court. In the Findings of Fact and Conclusions of Law, filed Feb. 3, 1993, the court found a taking as to Section B earlier than the DOT Notice of Taking. At

Conclusion of Law #8, page 32, the court set forth a briefing schedule for determining if the damages to Ehrlander; interest on the valuation of Section B should be interest on the amount determined by the jury in the condemnation trial as to Section B; or a jury trial with a possible new valuation and interest on the new valuation. This ruling vacated the portion of the summary judgment that said a new valuation should be determined for the purpose of calculating interest; and now that the court had determined an inverse condemnation as to Parcel B occurred, put at issue how the damages should be calculated. It was only if a trial were held that all the evidence Ehrlander had been presenting about $1.79 per square foot v. $5.00 per square foot became relevant. Subsequently, at oral argument on May 27, 1993, the court determined that the damages would be calculated by the amount of interest on the award already made by the jury in the condemnation trial on this same parcel, Parcel B. Ehrlander's motions and evidence that he was entitled in new damages (including lost profits and financing expenses, and not just interest on the valuation already set by the jury or a new valuation) was refusal to accept the Supreme Court ruling that he was entitled to interest only, not additional separate damages. A partial reduction is appropriate for these fees. *Williams v. City of Valdez*, 603 P.2d 483, 494, n. 3 (Alaska 1979), State v. Doyle, 735 P.2d 733, 742 (Alaska 1987); *Hickel v. Southeast Conference*, Slip Op. 4055, pp. 10-13, February 18, 1994.

c. This court has not considered settlement offers that were not conveyed under Alaska R. Civ. 68 in deciding attorney fees. *Myers v. Snow White Cleaners*, 770 P.2d 750 (Alaska 1989).

4. The court finds that prejudgment interest on costs and attorney fees shall not be awarded in this case and is not necessary to obtain just award.

5. The attorney fees awarded herein include paralegal expenses.

6. The State made no applicable Alaska R. Civ. P. 68 offers of judgment.

7. On November 27, 1992, an Alaska R. Civ. P. 68 offer of judgment was served on the State of Alaska from the plaintiff for $348,000. Alaska R. Civ. P. 68 (a) states that an enforceable offer is one that is made "At any time more than 10 days before the trial begins." (Emphasis added.) Trial began December 7, 1992. The days are computed as December 28, 29, 30, 31, January 1, 2, 3, 4, 5, and 6, granting all possibilities of methods of counting to Ehrlander this is ten days, not "more than 10 days." Therefore, Ehrlander's Rule 68 offer of judgment was not a timely, enforceable offer. *Meyers v. Snow White Cleaners*, 770 P.2d 750, 753 (Alaska 1989).

8. The State's Motion for Attorney Fees is DENIED.

DATED this 25 day of May, 1994, at Fairbanks, Alaska

Niesje J. Steinkruger, Superior Court Judge.

THE SUPREME COURT OF THE STATE OF ALASKA

Lars W. Ehrlander, appellant,
v.
State of Alaska, appellee

Supreme Court No. S-5047
Superior Court No. 4FA-86-886 CI

[No. 0731 - July 6, 1994]

MEMORANDUM OPINION AND JUDGMENT*

Appeal from the Superior Court of the State of Alaska, Fourth Judicial district, Fairbanks, Niesje J. Steinkruger, Judge

Before: More, Chief Justice, Rabinowitz, Matthews, Compton, Justices, and Bryner, Justice pro team**

FACTS AND PROCEEDINGS

This case involves taking of Lars Ehrlander's property for the construction of the Geist Road Extension in Fairbanks, Alaska. Ehrlander purchased the unimproved property intending to subdivide and develop the land. However, when Ehrlander submitted his subdivision request to the Fairbanks North Star Borough Platting Board in August 1983, his request was partially denied due to the possible extension of Geist Road. Three years later, the State began proceedings

* Entered pursuant to Appellate Rule 214.

** Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

to condemn part of Ehrlander's property. Shortly thereafter, Ehrlander filed an action for inverse condemnation against the borough and the State Department of Transportation (DOT) alleging that because of the partial denial of the subdivision request he was unable to develop or sell his property. The State's condemnation action proceeded to trial and the jury determined that the value of Ehrlander's land was $524,000. Although not satisfied with the award, Ehrlander did not appeal. The inverse condemnation action has also been completed.

On December 9, 1991, Ehrlander filed this motion for relief from judgment and consolidation of the two cases. The trial court denied both motions and, after finding Ehrlander's motion "frivolous and unnecessary," ordered Ehrlander to pay attorney's fees to the State. Ehrlander appeals the trial court's decision.[1]

We affirm.

CONCLUSIONS

1. In the condemnation jury trial Ehrlander presented his claim that the value of the property taken was worth from $4.50 to $4.95 per square foot and that the property which was not taken was damaged by the taking. The jury returned a verdict based on a value of $1.79 per

[1] A more detailed statement of the facts of this case and the legal issues involved is set forth in Ehrlander v. State, 797 P.2d 629 (Alaska 1990)

square foot for the property taken and awarded severance damages of $147,870. Ehrlander claims he was prevented from meaningfully presenting his theory as to the value of the property taken because of rulings made by the trial court based on the assumption that such evidence could be presented in the pending inverse condemnation trial. He also claims that he did not appeal the jury's verdict because he believed he would be entitled to a new determination of per square foot value in the inverse condemnation trial. These claims are contradicted by his counsel's statement at the condemnation trial that Ehrlander was seeking "fee value" as of 1986, the year of the formal taking, in the condemnation trial and loss of use type damages for the inverse condemnation case. Further, his claim that the trial court prevented him from presenting his theory of value is not supported by the record. For these reasons and the reason expressed in paragraph 3 of this opinion the superior court did not abuse its discretion in denying Ehrlander's motion for relief from judgment.

2. The trial court did not abuse its discretion in denying Ehrlander's motion to consolidate the condemnation and inverse condemnation cases. The motion was untimely since the jury trial in the condemnation case had taken place four years before the motion was made.

3. The trial court's award of attorney's fees of $2,000 in favor of the State was not an abuse of discretion. The State averred that it had

expended 48.5 hours defending Ehrlander's Rule 64(b) motion. At the claimed hourly rate of $135.00 per hour this would amount to a fee of $6,547.50. The motion essentially repeated contentions which Ehrlander made in the inverse condemnation case in his Motion to Determine Law of the Case dated January 25, 1991. These contentions were rejected in part and accepted in part by the trial court in its order of February 5, 1991. This order, in turn, was the subject of a petition for review to this court on the part of the State. In our order of July 24, 1991, we reversed the portion of the trial court's order which had accepted in part Ehrlander's contentions. Thus, the grounds on which the current motion was based have been rejected in prior rulings of this court and the trial court. No newly discovered evidence, change of law, or other grounds requiring reconsideration of these rulings was claimed.[2] The trial court correctly determined that the motion was frivolous. Under Civil Rule 77(j) attorney's fees may be awarded in condemnation cases as a sanction for frivolous motions.

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[2] See the following documents in Superior Court File No. 4FA-86-2287: Memorandum in Support of Motion to Determine Law of the Case Re: Inverse Condemnation Damages, January 25, 1991; Transcript of Hearing on Motion to Determine Law of the Case, January 28, 1991; Order Regarding Law of the Case, February 5 1991; Response to Petition for Review, April 8, 1991; Supreme Court Order Granting Petition for Review, July 24, 1991; Petition for Rehearing, August 5, 1991; and Supreme Court Order Denying Petition for Rehearing, August 22, 1991.

4. The orders from which this appeal has been taken are AFFIRMED.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,
vs.
State of Alaska, Department of Transportation and Public Facilities, defendants

Case: 4FA-86-2287 Civil

Signed: 6-2-95
Judge: Niesje J. Steinkruger

ORDER DENYING MOTIONS

Upon consideration of plaintiff Ehrlander's Motion for Summary Judgment and to Correct the record, Etc., which motions are dated April 19, 1995, and the court having considered the opposition of the State of Alaska,

IT IS HEREBY ORDERED that said motions are DENIED. Not only does this Court not have jurisdiction due to the pending merit appeals which have been perfected in this case, but the motions are not brought within the time required by the civil rules. Additionally, to the extent Ehrlander's motion is a Rule 60 (b)(1)(2)(3) motion, that motion is DENIED as untimely.

Dated: 6-2-95 Niesje J Steinkruger, Superior Court Judge.

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.
Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
2-6-96 ORDER

DENIED motions for merger (2287 & 870), ruling on judgment, and providing guidance. (No reason given)

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.
Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
4-30-96 ORDER

DENIED: Motion to amend points on appeal -- motion to merge and stay, and oppositions -- motion to waive final judgment in the 886 case, to merge (2287 & 886) -- motion to enforce AS 34,60,120 (3) -- motion for judgment on *Klopping* damages -- motion for compensation for the improvements -- motion to enforce the Bifurcation Agreement -- motion for the highest and best use.

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.

Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
5-2-96 ORDER

DENIED motion to merge, by full Court.

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.
Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
7-16-96 ORDER

DENIES motion to amend points on appeal and motion for relief from judgment. (On Judge Savell's conflict of interest)

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.
Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
[No. 0825 - July 31, 1996)

MEMORANDUM OPINION AND JUDGMENT*

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Niesje J. Steinkruger, Judge.

Before: Comgton, Chief Justice, Rabinowitz, Matthews, Eastaugh, Justices, and Shortell, Justice pro team.**

I. INTRODUCTION

The State appeals the trial court's finding that an inverse condemnation of Ehrlander's property occurred on September 19, 1984. Ehrlander cross-appeals for reconsideration of long settled valuation issues, for an earlier date of taking, for compound interest on his judgment, and for enhanced prejudgment. Both parties appeal issues relating to attorney's fees and costs.

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* Entered pursuant to Appellate Rule 214.

** Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

II. DISCUSSION

A. Should Ehrlander Receive "Full Subdivided Value" for the Property?

Answer: No. Ehrlander did not appeal the verdict in his formal condemnation case, 4FA-86-886 Civil. *Ehrlander v. State. Dep't of Transp.*, 797 P.2d 629, 632 (Alaska 1990). He did file a Rule 60(b) motion for relief from judgment on December 9, 1991, which was denied by the superior court as "frivolous and unnecessary." *Ehrlander v. State*, Mem. Op., & J. No. 0731 (Alaska, July 6, 1994) at 2 (hereinafter 7/6/94 MO&J).. We affirmed, noting that the grounds on which the [Rule 60] motion was based have been rejected in prior rulings of this court and the trial court. . . . The trial court correctly determined that the motion was frivolous." Id. at 4.

We have already held twice that "[j]ust compensation has been established in this case by the verdict of the jury." Order dated July 24, 1991, Supreme Court Case No. S-4460/4508 (hereinafter 7/24/91 Order). at l; see 7/6/94 MO&J at 4 & n.2. Ehrlander asks us yet again to reconsider. To the extent that he challenges the jury's findings from the formal condemnation trial, the doctrine of res judicata bars him from doing so. *See Mogg v. National Bank of Alaska*, 846 P.2d 806, 809 (Alaska 1993) (Res judicata provides that a final judgment on the merits is conclusive as to the rights of the parties involved, and as to these parties, constitutes an absolute bar to a subsequent action involving the

same claim). To the extent that he challenges this court's prior rulings in the present inverse condemnation case, the doctrine of law of the case bars such a reconsideration. *See Alaska Diversified Contractors, Inc. v. Lowe Kuskokwim Sch. Dist.* 778 P2d 581, 583 (Alaska 1989), cert. denied, 493 U.S. 1022 (1990) ("The doctrine of law of the case generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case. Former decisions will not be reconsidered absent 'exceptional circumstances,' a term which refers to clear error constituting a manifest injustice.") (citations omitted).

B. Did the Trial Court Err in Finding a Taking as of September 19, 1984?

Both sides appeal Judge Steinkruger's ruling upon remand that an inverse condemnation of the property occurred under the theory of *Lange v. State*, 547 P.2d 282 (Wash. 1976), on September 14, 1984. As an initial matter, we note that the context of the court's conclusions of law indicate that the court meant to refer to the date of Danny Johnson's letter to Ellerbe, September 19, 1984. We consider the five-day mistake to be de minimis for the calculation of the award.

1. State's appeal: Did the court err in finding a taking on September 19, 1984?

Answer: No. We address the State's six arguments in turn:

(a) Notice and opportunity to be heard

The State initially argues that it was entitled to rely on the dates submitted by Ehrlander pursuant to a court order of May 27, 1992. Ehrlander submitted a certificate listing twelve alleged dates of taking between August 19, 1983 and July 31, 1985, none of which was September 19, 1984.

The State was on notice that the court would be looking at a series of events between Ehrlander's purchase of the property in August 1983 and the formal condemnation in April 1986 to determine if the State ever formulated an intention to take Ehrlander's property. See 7/24/91 Order at 2 ("The issue on retrial should be whether there was an inverse condemnation. If an inverse condemnation is found, Ehrlander is entitled to interest, but not damages, from the date of the inverse condemnation until April 29, 1986."). There was no new issue injected into the case by the judge. The issues were always whether there was a taking under *Lange* and if so, When? given the amount of discovery conducted and the detail with witch every letter, statement, hearing, telephone call, and meeting during that two and a half year period was examined before and during trial, the possibility that the Johnson letter would assume some significance in the court's mind could not come as a surprise to the State.

(b) Actual restraint requirement

The State next argues that the *Lange* test adopted by this court in *Ehrlander*, 797 P.2d at 635, requires that the impairment of marketability arise from an actual restraint on development by the State. The letter from Johnson to Ellerbe informed Ehrlander that there would be no conflict between the Geist Road Extension and development of the Section A property. It did not mention Section B, so it cannot be said to have put an actual restraint on Section B's development. The State misreads Ehrlander, and confuses the "impaired marketability" requirement of *Lange* with the "unequivocal intention to take" requirement. The legal restraint in *Lange* clearly went to the marketability prong. 547 P.2d at 287. Here, the trial court's conclusions of law indicate that the Johnson letter was the final indication that the State had evidenced an unequivocal intention to take the property. It made a separate finding as to marketability: "Ehrlander made efforts to sell the land and he and realtors testified it was unmarketable because of the impending road and the resulting lack of access." The trial court's findings on marketability are unchallenged here. Moreover, the State's policy arguments seem exaggerated. The taking here was found only after a lengthy administrative process through which the specific property was identified and carefully defined and the State had evidenced an intent to take it. This is clearly

something more than "the mere identification of land for potential public use" that the State warns us about.

(c) Manifestation of intent

The State again draws a distinction between planning a project and intending to take property for that project when it argues that the Johnson letter did not constitute an unequivocal intention to take the Section B property. It notes that the letter merely expressed the state's non-objection to the development of the Section A ("First Addition") property.

The letter does not stand alone, however. The Trial court found that DOT made representations to Ellerbe's representative, who was platting the Section A development, that her plat would determine the legal boundaries of the portion of the Geist Road Extension passing through Ehrlander's property. The court found extensive input by DOT as to the metes and bounds description of the southern boundary of Section A: "In reality, the testimony established that both DOT and Ellerbe knew they were designating the exact location of the right-of-way which is why DOT and Ellerbe both worked so hard to clarify the exact curve and location of the southern boundary of the First Addition."

Thus, the fixing of the southern boundary to Section A is important because it also fixed the northern boundary to Section B where the road would be built. It was this specificity as to the boundaries of the land the State would take that the trial court found to be the last step necessary to evidence an unequivocal intent to take. The State confuses an intent to take with the ability to take or the availability of federal funding. The State's arguments do not counter the court's finding that DOT had demonstrated an unequivocal intent to take Ehrlander's property.

(d) Estoppel

The State argues that Ehrlander should be estopped from asserting a *Lange* claim due to his knowledge of the project before he bought the property and his request at the public hearing that the project be located over his land. This argument is meritless.

Lange warns against a bad faith purchaser who buys land to improve it in contemplation of condemnation. 547 P.2d at 288. The trial court here found no such bad faith on Ehrlander's part. It noted that between July 1983 and April 1986, Ehrlander took steps to market all of the property he had purchased. He sold nearly all the property which the State did not formally condemn; he tried to market Section B but received no offers. The record supports the court's findings that

Ehrlander' s actions were reasonable at the time and that he was not unfairly trying to benefit from the acquisition process.

(e) Waiver

The State next argues that "Ehrlander waived his claim for an earlier date of taking when he agreed that the Section B property should be valued as of April 29, 1986." This argument misrepresents Ehrlander's position at the formal condemnation trial. Ehrlander's counsel drew a clear distinction between the date of valuation and the date of taking, arguing that they need not (and should not) be the same. His position at the formal condemnation trial may prevent him from asserting an earlier date of valuation, but it will not prevent him from asserting an earlier date of taking.

The argument also ignores this court's implied holdings that a formal condemnation verdict does not preclude a finding of an earlier date of taking. In *Ehrlander* itself, we remanded for determination of whether the four-part *Lange* test had been met. 797 P.2d at 635. If the formal condemnation verdict had waived that claim, we would have so held; we did hold that Ehrlander's claim of interference that did not rise to a taking had been waived. Id. at 633. See also *Stewart & Grindle, Inc v. State*, 524 P.2d 1242 (Alaska 1974).

(f) Taking by series of steps

The trial court's findings demonstrate that it considered the Johnson letter to be the final step in a cumulative series of actions by the State which, considered together, evidence an unequivocal intent to take Ehrlander's property and which deprived him of the economic advantage of ownership. The State argues that as a matter of law, a taking cannot occur through a series of steps. The principle behind an inverse claim under *Lange* is that a landowner should be compensated when the State deprives him or her of the economic value of land before formal condemnation. The focus on marketability indicates that the court is concerned with the return available on investment property. The market would surely react to the context of a series of actions by the State which culminated in the deprivation of economic value described above but lacked a single explicit statement of intent to take. The court may properly consider it as well.[3]

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[3] The State cites *Zerbetz v. Municipality of Anchorage*, 856 P.2d 777, 782 (Alaska 1993), to argue that this court has rejected a "cumulative takings" theory. That case is inapposite. It involved two separate takings claims, one regulatory and the other physical, that were "factually unrelated and conceptually distinct." Id. The State extrapolates this into a requirement that a manifestation of intent must be a self-contained statement clear on its face without reference to the proceedings which came before or the context in which it is made.

The State's intent to take property may take months or years to crystallize, as the State's own briefs point out in describing the long planning process involved in a federal highway project. We hold that a series of steps may culminate in the formation and manifestation of an unequivocal intent to take a piece of property.

2. Ehrlander's cross-appeal: Did the court err in not finding an earlier taking date?

Answer: No. Ehrlander argues that when the Borough Assembly approved the route through Ehrlander's property as required by AS 35.30.010 et seq., the State's intention was effectively cemented. The superior court's holding -- that an unequivocal intent to take was not evidenced until the metes and bounds description of the border between the property the State intended to take and that which it did not intend to take was determined -- demonstrates an emphasis on the identification of a particular piece of land. Ehrlander may be correct in asserting that the State had previously formulated an intent to take some of his land. But we do not believe it was error for the court to find no inverse taking until DOT and Ellerbe had firmly established the boundary, thereby establishing which land the State would condemn.

c. Should the Court Have Awarded Compound Interest?

Answer: No. In *State v. Doyle*, 735 P.2d 733, 742 n. 15 (Alaska 1987), we "[left] open the question of whether in a proper case compounding of prejudgment interest would be appropriate in eminent

domain or inverse condemnation litigation." This is not such a case. The general rule in Alaska is simple interest. *Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956, 956 [Alaska 1983). Ehrlander references calculations proposed to the trial court which demonstrate that, using the Federal Cost of Money Rate and compounding semi-annually, the interest rate calculations would yield a significantly greater award. The trial court ruled that Ehrlander did not make an adequate showing that compound interest is necessary here to produce a sum comparable to the then-current market rate, or that Ehrlander's assumed rates are those which a reasonably prudent investor would realize. *See Doyle*, 735 P.2d at 742 n.15 (quoting *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980)). We find that the trial court did not err in holding that Ehrlander failed to present adequate evidence that compound interest was necessary here.

d. Should the Trial Court have Granted Enhanced Prejudgment Interest?

Answer: No. Ehrlander argues that the trial court erred in refusing to grant a five percent increase on the prejudgment interest rate under AS 09.30.065 and Alaska Civil Rule 68. The court held that Ehrlander's settlement offer was not timely since it did not come "more than 10 days before the trial begins." (emphasis in original) (quoting Alaska R. Civ. P. 68(a)). It is clearly true that there are not

more than ten days between the date of the offer, November 27, 1992, and the beginning of trial on December 7, 1992. The court was correct in denying the motion.[4]

E. Did the Trial Court Err in Its Attorney's Fee Award?

Both parties appeal on the issue of attorney · s fees . The trial court awarded Ehrlander $153,085.50 in attorney's fees, or 75% of his actual fees. It denied the State's motion for attorney's fees.

1. Did the court err in denying fees to the State?

Answer: No. We have ruled that Civil Rule 72(k) is the exclusive provision governing the award of attorneys fees in eminent domain actions, including inverse condemnation proceedings, and that Rule 82 does not apply. *Stewart & Grindle*, 524 P.2d at 1251; , 539 P.2d 1169, 1173-74 (Alaska 1975) ; *Williams v. City of Valdez*, 603 P.2d 483, 492-93 (Alaska 1979) (applying to inverse condemnation). We have also held that under Rule 72, "a condemnor should not be allowed to recover attorney's fees in inverse condemnation cases." *Williams*, 603 P.2d at 493. This applies whenever the "essential nature of the state's action" was "the exercise of the power of eminent domain." Id. at 494 (quoting State, *Dep't of Highways v. Crosby*, 410 P.2d 724, 728 (Alaska

[4] Fairbanks North Star Borough v. Tundra Tours, Inc., 719 P.2d 1020, 1035 (Alaska 1986), cited by Ehrlander, interpreted a previous version of the statute and does not apply here.

1966)). Since Rule 72(k) does not provide for an award of attorney's fees to the State, the trial court's decision must be upheld.[5]

2. Did the court err in awarding only partial fees to Ehrlander?

Answer: No. Judge Steinkruger awarded attorney's fees to Ehrlander, but reduced the award to 75% of actual fees incurred with a very extensive explanation. See Order Re: Fees and Costs, May 26, 1994.

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[5] The State misreads *Stewart v. State. Department of Transportation*, 693 P.2d 827 (Alaska 1984). That case held that where the condemnee asserts counterclaims that are essentially common law actions such as negligence, the condemnor can be awarded costs. □ at 831. The issues litigated in Stewart related to the landowners' request for a TRO against the State to prevent the State from removing trees on its own property, issues "not related to the State's action seeking to condemn the Stewarts' real property." Id. The issues raised by Ehrlander throughout the long history of this case were often repetitive and often reused to accept prior rulings in the case; these are issues that may affect Ehrlander's own award of attorney's fees. But all of the claims he asserted, and all of the attorney's fees he incurred, were of the "essential nature" of an inverse condemnation action, and once the court finds a taking it is not authorized under Rule 72(k) to award attorney's fees to the condemnor. The State also cites *Stewart*, 693 P.2d at 831 n.3, to argue that since no taking was ever found with respect to the Section A (First Addition) property, Rule 72 does not apply to that claim. However, the Stewart footnote assumed a dismissal of all inverse taking claims, whereas here the Landowner established a permanent taking for the parcel upon which most of the litigation focused, and lost only a temporary tanking argument that played only an incidental role. We also note that before the highway project, there was no Section A and Section B, but it was all one piece of property to be subdivided.

She noted that a substantial portion of the fees incurred prior to Ehrlander's settlement with the Borough related to his claims against the Borough, not the State; while there was some overlap, some reduction was appropriate. She also noted that a "substantial portion" of his pretrial motions and trial presentation after this court's remand related to trying to obtain a new valuation of the property, and presenting evidence of claims previously ruled upon. She noted that these efforts were "without legal basis," and recognized his "refusal to accept the Supreme Court ruling that he was entitled to interest only, not additional separate damages." The explanation offered by Judge Steinkruger gave adequate reasons to reduce the award of attorney's fees. Many of the fees incurred by Ehrlander did not relate to the narrow issue on remand. The reduction in fees was appropriate.[6]

F. Did the Trial Court Err in Its Cost Award?

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[6] Ehrlander also appeals the trial court's holding that "prejudgment interest on costs and attorney fees shall not be awarded in this case and is not necessary to obtain a just award." We have held that interest on attorney's fees in a condemnation action is not necessary to achieve just compensation and the decision whether to award such interest rests in the discretion of the trial judge. *Bozek Brothers v. Anchorage*, 750 P.2d 335, 338 (Alaska 1988). Ehrlander has made no showing that the trial court abused its discretion

Answer: No. The trial court denied costs to the State and awarded costs to Ehrlander in the amount of $42,345.27. The State appeals both rulings. We affirm.

1. Denial of cost to the State

The State argues that it is entitled to recover costs "because it prevailed on the main claims in litigation, and because the State prevailed on inverse claims brought by Ehrlander which were separate from the *Lange* claim." Like attorney's fees, the award of costs is governed exclusively in eminent domain proceedings by Civil Rule 72(k). And like attorney's fees, Rule 72(k) allows no award of costs to the State.

2. Award of costs to Ehrlander

The State argues that Ehrlander may not recover those expenses that were not "necessarily incurred." "[C]osts are 'necessary' and, therefore, compensable only to the extent that they are reasonable." *Badger Constr. Co. v. State*, 628 P.2d 921, 924 (Alaska 1981).

The trial court here found:

> While some of the costs that were incurred were for the development of evidence that was not presented in the final trial of the inverse condemnation, Rule 72(k) does not require that they be disallowed. At the time they were incurred, they were reasonable costs in light of the status of the litigation and the issue at that stage. The court finds that it is not just to deny costs that were reasonable and necessary at the time, but later not necessary because subsequent

rulings made their presentation in the final trial unnecessary or precluded.

We can find no abuse of discretion in this holding.

III. CONCLUSION

We AFFIRM the superior court's ruling on all issues.

THE SUPERIOR COURT FOR THE STATE OF ALASKA

State of Alaska, Plaintiff,
v.
6.313 Acres, more or less;
and Lars W. Ehrlander, Defendant.
Superior Court Case No. 4FA-86-886 Civil

Judge Niesje J. Steinkruger
August 26, 1996

ORDER

(IT IS HEREBY ORDERED AND DECREED that a Final Order will be issued in this case.)

8-26-96

Denied. A final judgment has existed in this case and case # 4FA-86-2287. The Motion for trial is denied as the issues have been addressed in 4FA-86-886 and 4FA-86-2287.

Signed Judge Steinkruger

THE SUPERIOR COURT FOR THE STATE OF ALASKA

State of Alaska, Plaintiff,
v.
6.313 Acres, more or less;
and Lars W. Ehrlander, Defendant.
Superior Court Case No. 4FA-86-886 Civil

Judge Niesje J. Steinkruger
September 28, 1996

ORDER DENYING EHRLANDER'S CROSS-MOTION FOR CIVIL RIGHTS VIOLATIONS, EXTORTION, ETC.

The court having considered Ehrlander's Cross-Motion for Civil Rights Violations, Extortion, Etc., and the opposition of the State of Alaska,

IT IS HEREBY ORDERED that said motion is denied. Any Civil rights, extortion claims must be litigated in a separate action. The motion for reconsideration of the 8-26-96 Order is Denied.

Dated: 9-28-96
Signed Niesje J. Steinkruger, Judge of the Superior Court

OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW IN COMPANION CASES

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars W. Ehrlander, Plaintiff,

v.

State of Alaska Department of Transportation; Mr. John Athens in his official and personal capacity. Defendants.

Case No. 4FA-95-0870 Civil

Judge Richard D. Savell, Superior Court Judge

DEC 13,1995

MEMORANDUM DECISION

Before the Court is a motion for summary judgment filed by defendants State of Alaska, Department of Transportation (DOT}, and John Athens (Athens), in his professional and personal capacity (collectively, the State), and a cross-motion for summary judgment filed by plaintiff Lars Ehrlander (Ehrlander). In his complaint, Ehrlander raises the following claims: 1} the State effected an unconstitutional taking of his property without just compensation in Case No. 4FA-86-886CI, a formal condemnation action, and Case No. 4FA-86-2287CI, an inverse condemnation action; 2} the State violated his state and federal constitutional rights; and 3) the State committed the common law torts of "malfeasance, malice, and misrepresentation" in its handling of the condemnation and valuation of his property. The State asserts that these claims are alternatively barred based on immunity, statute of limitations or *res judicata.* Although Ehrlander's motion is denominated as a cross motion for summary judgment, he also requests relief in the form of a new trial on the issue of damages and

enforcement of a stipulation agreement between the parties to bifurcate the prior condemnation and inverse condemnation actions.

FACTUAL AND PROCEDURAL BACKGROUND

The dispute between the parties spans more than a decade, stemming initially from the State's condemnation of a portion of Ehrlander's property which lay in the path of the Geist Road Extension project. Since Ehrlander's acquisition of the property, extensive litigation has ensued. Throughout the course of the previous litigation, Ehrlander was represented by attorneys Robert John and William Satterberg. DOT was represented in part by Athens, Assistant Attorney General.[1] In the present lawsuit, Ehrlander is a pro □ litigant. The facts leading up to the current and previous litigation between the parties can be summarized as follows:[2]

Ehrlander, a real estate developer, purchased a 24 acre parcel of

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1. Athens represented the State on both the formal condemnation case and the inverse condemnation case in 1986 and early 1987. In 1987, both Ehrlander cases were referred to Gary Vancil (Vancil). Vancil, as private counsel, represented the State through trial on the condemnation case and through the first merit appeal on the inverse condemnation case.

2. The factual background is developed in greater detail in *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990) and in Judge Steinkruger's Findings of Fact and Conclusions of Law in *Ehrlander v. State*, Case No. 4FA-86-2287CI.

essentially unimproved property in Fairbanks in 1983. At the time of his purchase, Ehrlander was aware that a portion of the property lay within the proposed path of the Geist Road Extension project contemplated by DOT. Despite this potential interference, Ehrlander believed he could subdivide the entire property.

On July 21, 1983, Ehrlander paid $1,000 in earnest money toward the property. On August 9, 1983, Ehrlander Closed the purchase of the property using $1.2 million in short-term financing. Subsequently Ehrlander awarded contracts to install roads, a sewer system, a water distribution system, and other infrastructure on the property. Further, Ehrlander sought to have the entire property annexed to the City of Fairbanks, and secured a 5500,000 performance bond for the city to insure that the improvements would be completed. Ehrlander employed Ellerbe Alaska, Inc., to prepare a plat for the subdivision to be known as Royal Court Village.

Shortly thereafter, Ehrlander submitted a subdivision request to the Borough. Ehrlander had previously contacted DOT directly and was told that DOT's long term plans for the Geist Road Extension were not likely to interfere with Ehrlander's subdivision plans. During the time that Ehrlander was seeking approval of his subdivision plans, the Borough was in regular contact with DOT concerning the proposed path of the road extension. DOT had not

yet established the precise placement of the road. In August 1983, without notifying Ehrlander, DOT submitted an amended proposal to the Borough in which three of the four proposed road locations traversed the southern portion of Ehrlander's property. Ehrlander continued with his efforts to subdivide the property. In September 1983, the City of Fairbanks (City) approved the Royal Court subdivision, under an agreement that Ehrlander would receive City utilities upon improvement of the property to the City's standards. Subsequent to the City's approval, a number of problems developed with the Borough Platting Board (Board) concerning the subdivision plans. Several hearings before the Board ensued. Relying on DOT's representations that the likely path of the Geist Road Extension would traverse Ehrlander's property, the Board approved Ehrlander's subdivision request in part, but denied it with respect to the area encompassing the potential route of the extension, roughly the southern two-thirds of the property. This area is reflected as Sections A and B on the attached appendix.

DOT had indicated that the actual location of the road extension would be determined by field survey, but would lay no further north than the red line noted on Ehrlander's plat. This line is approximately reflected on the appendix as the line between Section A and Section B. Accordingly, the Board approved phased development of

the property, with Sections A and B of property remaining unimproved pending DOT's decision as to exact location of the road.

Ehrlander proceeded to market the lots in the northern portion of his property, known as Royal Court village. At this time, Ehrlander remained hopeful that his subdivision plans for Section A might be approved in the event that DOT chose a more southern route for the Geist Road Extension. Ehrlander subsequently sought reconsideration of the Board's partial denial his subdivision plat. Aside from the approval of two additional lots for development, the Board affirmed its August 24, 1983 decision.

Following the Board's partial denial of Ehrlander's subdivision plat, DOT proceeded with public hearings as to the precise location of the Geist Road Extension. The only potential route not passing through Ehrlander's property would traverse the property of Monroe High School. The public strongly resisted this option in favor of the route passing through Ehrlander's property.

In December 1983, the Borough and the State formally chose the designated route for the Geist Road Extension as the one passing through Ehrlander's property. The State indicated to Ehrlander its intent to formally initiate acquisition procedures against that portion of Ehrlander's property located to the south of the red line on the plat, i.e., Section B on the appendix.

In early 1984, Ehrlander began to prepare a second subdivision proposal. With the aid of Karen Tilton of Ellerbe Alaska, Ehrlander prepared an initial plat for a second subdivision, to be known as Royal Court Village, First Addition. The subdivision was to be located in Section A, on that portion of his property to which the Board had denied subdivision at the hearings in August and September I983. This parcel lay to the north of the route designated for the Geist Road Extension. Tilton spoke extensively with DOT to ensure that the design of the second subdivision plat would not conflict with the plans for the road construction. Ehrlander received final plat approval from the Board for this subdivision in March 1985.

The Geist Road Extension, as constructed in 1990, substantially corresponds with the location agreed upon by Tilton and DOT. Ehrlander incurred additional expenses in replatting and redesigning the Royal Court Village, First Addition portion of the subdivision.

On April 29, 1986, the State filed the Notice of Taking as to that portion of Ehrlander's property located south of the Royal Court Village, First Addition, depicted as Section B on the appendix. The condemned property was divided into four tax lots at the time of the taking and amounted to slightly over 6 acres. Prior to issuance of the Notice of Taking, the State sought to appraise Ehrlander's property and the parties entered into negotiations to determine the value of the land

taken and the related expenses incurred by Ehrlander. On December 3, 1987, the State's appraiser, Gary Hoagland (Hoagland) determined the value of condemned property to be $4.50 per square foot. Hoagland his appraisal on the assumption that the property was fully subdivided. When no agreement resulted, the State instituted a Condemnation action in court.

On April 29, 1986, the State initiated condemnation proceedings, in Case No. 4FA-86-886CI, with respect to the southern portion of Ehrlander's property, Section B on the attached appendix. In turn, Ehrlander filed an inverse condemnation action against the Fairbanks North Star Borough (the Borough) and DOT in Case No. 4FA-86-2287CI. The two actions were initially consolidated by Judge Blair. Subsequently, by stipulation, the condemnation action was severed from the inverse condemnation claim, with the condemnation action to be tried first. The bifurcation order, dated November 20, 1987, specified that the issues to be determined in the inverse condemnation action were "damages and compensation due Ehrlander for that period of time from August 24., 1983 until April 29, 1986."

At the condemnation trial, a jury awarded Ehrlander damages in the amount of $1.79 per square foot, a total of $524,000, for the condemned property, in addition to severance

damages of $147,870. This award mirrored the amount sought by the State. Ehrlander had argued that the property was between $4.50 and $4.95 per square foot, approximately the value set by the State's appraiser. Ehrlander did not appeal this verdict. Subsequently Ehrlander settled his inverse condemnation case claim with the Borough, leaving DOT as the only remaining defendant.

Judge Steinkruger, who was assigned to the remaining inverse condemnation action following Judge Blair's retirement from the bench, granted summary judgment in favor of DOT and consequently dismissed all of Ehrlander's claims. Judge Steinkruger's ruling was based on Ehrlander's failure to exhaust his administrative remedies. Ehrlander appealed.

In his appeal he claimed that the court erred in dismissing his complaint for failure to exhaust administrative remedies because his claims were not based on the action of the platting board. He also argued that DOT unreasonably delayed in bringing the condemnation proceedings and that such delay amounted to an imputed taking. Alternatively, he argued that even if there were no imputed taking, DOT acted unreasonably prior to instituting the condemnation action, causing a decline in the value of his property.

On appeal, the supreme court reversed the trial court's grant of summary judgment and remanded the case to determine whether an

imputed taking of Ehrlander's property had occurred under *Lange v. State*, 547 P.2d 282 (Wash. 1976).[3] *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990). The Ehrlander court stated:

> In the event that an inverse condemnation is found, interest should run from the date of inverse condemnation until April 29, 1986. Whether interest should be calculated on the award already made by the jury in the condemnation trial or whether a new value should be determined for the purpose of calculating interest is a question which has not been briefed and we express no opinion on it.

Id. at 636.[4]

On remand, the trial court concluded that an imputed taking had occurred as of September 14, 1984, and that Ehrlander was

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[3] In order to determine this, the Court must examine what has come to be known as the Lange factors:

> For the time of valuation to be advanced, [1] marketability must be substantially impaired and [2] The condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. [3] The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. [4] Further, the owner must have taken active steps to accomplish this purpose.

Ehrlander at 634, citing *Lange v. State*, 86 Wash.2d 585, 547 P.2d 282 (1976).

[4] In its Memorandum in Support of Summary Judgment, the State maintains that the supreme court "affirmed the [superior court's] dismissal of the inverse condemnation claim." This statement is misleading. While the supreme court affirmed the lower court's ruling that DOT could not be held responsible for damages stemming from the Borough's denial of Ehrlander's subdivision plat, the opinion expressly left open the issue of whether an inverse condemnation occurred.

entitled to be compensated from that date to April 26, 1986 the date from which the jury awarded damages in the condemnation case. The court left the parties to brief the issue of measures of damages. The parties disputed whether the supreme court's opinion in *Ehrlander* proscribed a new measure of damages or merely allowed for an advancement of the date of taking for purposes of calculation of interest.

In an order dated July 24, 1991, on consideration of a petition for review, the supreme court clarified its previous opinion in Ehrlander:

> Just compensation has been established in this case by the verdict of the jury. . . . The issue on retrial should be whether there was an inverse condemnation. If condemnation is found, Ehrlander is entitled to interest, but not damages, from the date of the inverse condemnation until April 29, 1986. As expressed in our prior opinion, it is an open question whether a new value should be determined for the purpose of calculating interest.

In December 1992, the court trial was held on the remanded *Lange* claim to determine if the date of taking should be advanced. On October 20, 1993, judgment was entered on the *Lange* claim awarding Ehrlander $114,420 in interest, plus prejudgment interest, costs, and attorney fees.

Ehrlander next filed a Rule 60(b) motion seeking reconsideration, which the court denied. In Memorandum Opinion and Judgment No. 0731, issued on July 6, 1994, the supreme court

affirmed the trial court's denial of the Rule 60(b) motion. Ehrlander and the State have appealed the superior court's judgment on the *Lange* claim. These appeals, S-6075 and S-6076, are now pending. In the pending appeals before the Alaska Supreme Court, in addition to many other assertions, Ehrlander also maintains his claims of fraud, misrepresentation, newly discovered evidence, and breach of fiduciary duty.

Ehrlander, acting as a pro se plaintiff, now brings a variety of claims against both the State and Athens, in his professional and personal capacity. These claims are exclusively based upon conduct which allegedly occurred in the course of the prior litigation.

In sum, Ehrlander claims that: 1) the State has yet-to fairly compensate him for the taking of his property; 2) he was prohibited from presenting evidence at trial regarding the value of his property and lost profits; 3) the State, Athens, and others conspired to defraud the court; 4} Athens has committed malpractice and should be disbarred; 5) the State breached a stipulation agreement; and 6) the State and its representatives acted in bad faith and in violation of fiduciary duties with respect to the condemnation and valuation of Ehrlander's property. The parties have each moved for summary judgment. *Ehrlander v. State of Alaska, et al.* 4FA-95-0870 Civil.

THE STATE' S MOTION

The State has moved for summary judgment asking that all claims against it be dismissed with prejudice. The State raises the following arguments in support of its motion: 1) the State cannot be sued for federal constitutional civil rights claims; 2) Athens is immune from all federal constitutional claims against him in his personal capacity; 3) the state constitution bars this suit for damages; 4) common law tort claims against the State and Athens are barred by both a lack of duty and immunity; 5) all tort claims arising before April 10, 1993, are barred by the statute of limitations; and 6) all remaining claims are barred by *res judicata.* Ehrlander filed a lengthy opposition to the State's summary judgment motion and cross-moved for summary judgment. He subsequently filed a pleading entitled "Amended Statement of Genuine Issues" which lists what he claims to be thirty-nine genuine issues of material fact precluding summary judgment. This list essentially repeats his arguments outlined in his complaint and Memorandum in Opposition to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment.

Ehrlander summarizes his "Whole Memorandum in One Sentence:"

> Based on the premise that the State is not immune from paying Just Compensation for property it takes, nor from providing Due Process, and that there is no tolling of time in a Constitutional taking

> case, or at least time does not begin until injury is known, and since the parties have stipulated on bifurcating these issues to a second trial, and these issues have not been heard by any finder of facts, and the State committed fraud, I filed this case to have the Bifurcation Order, Stipulating Agreement enforced, to receive business damages, to have the property appraised according to law, and to establish if my property that was taken on April 29, 1986 was impaired by the highway project, and if it was appraised in its impaired state by the State of Alaska, in violation of A5.34.60.120(3), and if there were compensable damages.

In addition to the claims in his above-stated summary, Ehrlander also raises claims of ineffective assistance of counsel, newly discovered evidence, breach of fiduciary obligations, and a "thief theory."

DISCUSSION

Summary judgment is appropriate only where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Thorstnenson v. ARCO Alaska, Inc.*, 780 P.2d 371, 374 (Alaska 1989) ; Alaska R. Civ. Proc. 56 (c). In making this determination the Court must view the facts in the light most favorable to the nonmoving party. *Gudenau & Co. Inc. v. Sweenev Insurance, Inc.*, 736 P.2d 763, 7B5 (Alaska 1987); *Estate of Arrowwood v. State*, 894 P.2d 642, 644 n.2 (Alaska 1995).

The Condemnation/Inverse Condemnation Claims Are barred By Res Judicata.

Ehrlander claims that the State failed to adequately compensate him for the losses he incurred as a result of the State's condemnation of his property. Specifically, Ehrlander maintains that his property should have been appraised as subdivided, improved city lots and that the State wrongfully based its valuation on values associated with large tracts of unimproved land. Further, Ehrlander maintains that the State violated the terms of the bifurcation agreement by not awarding him the damages he alleged. He requests a new trial on the issue of the measure of his damages.

The State does not address the merits of these claims, but instead argues that they are precluded by *res judicata*, based on the judgments rendered in the prior condemnation and inverse condemnation actions. The State asserts that any claims not so precluded are barred by the statues of limitation or immunity.

Ehrlander's main contention throughout his voluminous pleadings is that the State and Athens took his property without "just compensation." However, this Court need not address the merits of these claims since they are barred by the doctrine of *res judicata*. Under the doctrine of res judicata, a final judgment bars a subsequent suit, between the same parties or their privies, upon the same claim or demand. *Jackinsky v. Jackinsky*, 894 P.2d 650, 654 (Alaska 1995); *Tolstrup v. Miller*, 726 P.3d 1304, 1306 (Alaska 1986). A final

judgment extinguishes all claims "with respect to all or any part of the transaction, or series of connected transactions" out of which the previous action arose. Restatement (Second) of Judgments §24 (1982). Further, res judicata "precludes relitigation by the same parties, not only of claims raised in the first proceeding, but also those relevant claims that could have been raised." *Martech Construction Company, Inc. v. Ogden Environmental Services, Inc.*, 852 P.2d 1146, 1152, n. 13 (Alaska 1993); *Tolstruo v. Miller*, 726 P.2d 1304, 1306 (Alaska 1986).

In order to promote judicial economy and consistency of judgments, res judicata bars a party from using a new theory to relitigate a matter that has already been fully litigated. An issue has been fully litigated when it has been effectively raised, "either in the pleadings or through development of the evidence argued at trial or on motion." *Murray v. Feight*, 741 P.2d 1148, 1153-54 (Alaska 1987). A final judgment extinguishes all claims "with respect to all or any part of the transaction, or series of connected transactions" out of which the previous action arose. *Tolstrup*, 726 P.2d at 1306, quoting Restatement (Second) of Judgments §24 (1982). *Res judicata* does not act as a bar when the conduct giving rise to the later suit post-dates the conclusion of the first suit. *Jackinsky*, 894 P.2d at 656. In addition, *res judicata* does not bar a suit if the party did not have opportunity to litigate the matter at issue in the earlier suit. Ehrlander apparently argues that

because he did not receive the measure of damages he sought, this issue was not fully litigated. He misapprehends the doctrine of *res judicata*. Each of the elements is present with respect to Ehrlander's current condemnation/inverse condemnation claims: 1) in Case No. 4FA-86-2287, the previous inverse condemnation action, the Alaska Supreme Court ruled that Ehrlander had received "just compensation" at the condemnation trial and was accordingly only entitled to interest from the date of the taking; 2) that case, as this one, involved the issue of compensation for the State's imputed taking of Ehrlander's property prior to issuance of the Notice of Taking; and 3) both Ehrlander and the State were parties to that action. Neither Ehrlander's dissatisfaction with the outcome of the prior litigation; nor his wholehearted belief that both the superior court and supreme court erred, will remove his current claims from the confines of *res judicata*.

Ehrlander argues that because "[n]one of the issues that [he] raise[s] have been heard by any Court," *res judicata* is inapplicable. While Ehrlander never succeeded in recovering business damages, or *Klopping* [5] damages in the prior litigation, it was not for lack of an opportunity to raise the issue. On at least four occasions, Ehrlander argued for the recovery of *Klopping* damages: I) before the supreme

[5] Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972).

court in Ehrlander, P.2d at 633, on appeal from the superior court's grant of summary judgment in favor of the State; 2) in his motion for clarification of the supreme court's decision in Ehrlander; 3) in his Rule 60(b) motion following the superior court's judgment in the verse condemnation trial; and 4) in his appeal from the superior court's judgment in the inverse condemnation trial, which is now pending before the supreme court.

Ehrlander's claims that he has not been fairly compensated for the imputed taking of his property have been fully litigated and decided in the prior litigation. Ehrlander is precluded by *res judicata* from relitigating these claims as a pro se plaintiff, regardless of his dissatisfaction with the outcome of the prior actions. No material factual issues exist with respect to these claims and the State is entitled to judgment as a matter of law. Summary judgment should be granted in favor of the State as to these claims.

Tort Claims of Fraud and Misrepresentation

Ehrlander makes several allegations that the State, Athens, and others conspired to commit fraud upon the court conspiring to take his property for as little as possible, misrepresenting the value of his property to the court, using deceptive language and incorrect facts to mislead the court.

The tort of intentional misrepresentation, as recognized under Alaska law, consists of the following elements: a false representation of fact, scienter, intention to induce reliance, justifiable reliance, and damage's. *Barber v. National Bank of Alaska*, 815 P.2d 857, 862 (Alaska 1991) ; Restatement (Second) of Torts §525 (1976). Negligent misrepresentation requires a similar showing, absent the scienter element, where there exists a duty "to exercise reasonable care or competence in obtaining or communicating the information." *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 (Alaska 1984); Restatement (Second) of Torts Sec. 552 (1976).

Ehrlander realizes that no action for misrepresentation can lie against the state,[6] but alleges numerous fraudulent activities and misrepresentations by Athens in his personal capacity. However, many of his accusations of fraud are against acts allegedly committed by Mr. Vancil,[7] who is not a party to this litigation. These cannot be used against Athens. In addition, most of Ehrlander's tort claims against Athens are based on his disagreement with Athens' interpretations of the law. Apperently Ehrlander believes that taking a contrary legal position on a matter is fraudulent.

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6. AS 09.50.250 expressly bars all claims against the State for misrepresentation.

Most of the statements cited by Ehrlander for support his fraud claim against Athens are legal arguments which Mr. Athens made to the court in the prior litigation. For example, Ehrlander takes issue with Athens' argument at the summary judgment hearing before Judge Blair that "the Ventures in Property case" was distinguishable from the Ehrlander condemnation, and his legal interpretation of AS 34.60.120(3). While Ehrlander obviously disagrees with opposing counsel's interpretations, Athens' legal arguments do not amount to fraud. And, to the extent they are incorrect and are relied upon by the Court, Ehrlander's avenue for redress is to appeal.

In addition to reference to a variety of other legal arguments made by Athens in the course of the prior litigation, Ehrlander claims that Athens made at least one factual misrepresentation to the court. Ehrlander asserts that the July 2, 1991, affidavit of Michael Tinker (Tinker), prepared by Athens, contained an erroneous date concerning a public hearing. Tinker affied that a public hearing on the issue of DOT's plan change was held on January 26, 1983, when in fact the

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7. Mr. Vancil was a contract attorney hired by the State to take over the case. Because Ehrlander has stated that he does not intend to raise a tort claim against the State, and because Vancil, in his individual capacity, is not a named party in this action, Ehrlander's allegations concerning Vancil's conduct are not considered in the discussion of his fraud claims.

hearing was held on that date in 1984. Ehrlander argues that this date was intentionally misstated in order to mislead the court as to the date of the imputed taking in the prior inverse condemnation action.

The State disputes this allegation, asserting that the affidavit referred to a different hearing than the one referenced by Ehrlander-and that no misrepresentation occurred. The State argues that Ehrlander's assertions, if believed, fail to establish the justifiable reliance element necessary to support a misrepresentation claim.

The State asserts that in the adversarial setting of litigation, the representations of opposing counsel cannot be said to induce reasonable reliance. while this argument is persuasive with respect to counsel's good faith legal arguments in cases where the applicable law is open to interpretation, the same cannot be said for counsel's factual representations made in the course of litigation. Given counsel's ethical duty of candor toward the court under Professional Conduct Rule 3.3, it is not only justifiable but integral to our legal system for litigants to rely upon the factual statements of opposing counsel.

The prosecution of Ehrlander's inverse condemnation claim led to a final judgment from which he has appealed to the Alaska Supreme Court. Inter alia, he has raised the issue of fraud on appeal. These facts do not prevent the operation of res judicata. *Calhoun v. State, Dept. of Transp.*, 857 P.2d 1191, 1195 (Alaska 1993) (the

superior court correctly held that *res judicata* barred Calhoun's fraud/misrepresentation claims). His relief has been sought in that case.

Even if this Court construes Ehrlander's pleadings as requesting relief from judgment under Civil Rule 60(b) in the form of an independent action,[8] the motion must have been brought within a reasonable time. The one year time limitation does not apply to proceedings to correct orders obtained by fraud upon the court. *Mallonee v. Grow*, 502 P.2d 432, 437 (Alaska 1972).

Under Civil Rule 60(b), to constitute "fraud upon the court," intent to defraud is not a necessary element and may be found even where representations are made with a good faith belief in their truth. *Allen v. Bussell*, 558 P.2d 496, 500 (Alaska 1976). However, the conduct must be so egregious that it involves a corruption of the

8. Rule 60(b) contains the following provisions:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal rep representative from a final judgment, order, or proceeding for the following reasons:
> (3) fraud (whether heretofore denominated intrinsic or, extrinsic), misrepresentation, or other misconduct of an adverse party; . . .
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or order as defined in Civil Rule 58.1(c). . . . This rule does not limit the power of the court to entertain an independent action to relieve s party from a judgment, order or proceeding, . . . or to set aside a judgment for fraud upon the court. . . . The procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

judicial process. Village of *Chefornak v. Hooper* Bay Construction, Co., 758 P.2d 1266, 1271 (Alaska 1988).[9]

In order to justify setting aside a judgment under Rule 60(b), the nature of the alleged fraud must have been sufficient to affect the result of the trial. *See McCall v. Coats*, 777 P.2d 655, 657-658 (Alaska 1989). Ehrlander has not demonstrated how the error in the Tinker affidavit would alter the outcome of his prior litigation if he were permitted to maintain an independent action for fraud. Further, an independent action to obtain relief from judgment is a most unusual remedy, and historically available only where there was extrinsic, as opposed to intrinsic fraud. *Stone v. Stone*, 647 P.2d 582, 586 n. 7 (Alaska 1982) (fraud alleged by wife could have been anticipated in original proceeding).

Athens' factual misrepresentations, if any, but not his prior good-faith legal arguments, might be considered in support of Ehrlander's fraud claim. With respect to the only alleged factual misrepresentation made by Athens, i.e., the Tinker affidavit, a material factual issue arguably exists as to whether this statement induced

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9. The courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the parties in the case and involved no direct assault an the integrity of the judicial process. Nondisclosure by a party or his attorney has not been enough. *Livingston v. Livingston*, 572 P.2d 79, 82 (Alaska 1977).

reliance and whether it resulted in legal damages. If the discrepancy in the date of a meeting would be material to the outcome, Ehrlander's remedy is to apply for Rule 60(b) relief in the court which rendered the judgment rather than filing an independent action. The original trial court is in a better position to determine whether the alleged fraud affected the outcome of this case.

The State also argues that, to the extent that Ehrlander's assertions, if believed, would be sufficient to withstand summary judgment on the fraud claims against Athens, the claims are nonetheless barred by the doctrine of sovereign immunity and the applicable statute of limitations. These defenses must be examined.

Statutory Immunity

The State asserts that Ehrlander's claims of fraud against Athens are barred on the basis of sovereign immunity. 09.50.250(3) expressly bars claims of misrepresentation against the State. The doctrine of sovereign immunity, delineated in this statute, applies to employees of the state, as the state may only act through its employees. Ehrlander does not dispute that Athens is a state employee for purposes of AS 09.50.250. Instead he argues alternatively that Athens has waived his immunity based on his fraudulent statements and that he is estopped from raising any defenses against Ehrlander's claims. Ehrlander apparently argues that because Athens acted beyond the

scope of his employment as counsel for DOT, the statutory immunity does not apply to him. Ehrlander has failed to establish that Athens engaged in misconduct which would constitute activity beyond the scope of his professional duty, and thus fall outside the purview of the statutory immunity. Ehrlander's misrepresentation claim is barred based on statutory sovereign immunity.

Statute of Limitations

The State also asserts that Ehrlander's misrepresentation claim is time barred. AS 09.10.070 provides that all tort actions must be commenced within two years after the cause of action has accrued. *Silverton v. Marler*, 389 P.2d 3, 4 (Alaska 1964). Similarly, claims for fraud and misrepresentation sound in tort and are subject to a two year statute of limitations. *Bauman v. Day*, 892 P.2d 817, 825 (Alaska 1995). Since Ehrlander filed his current complaint on April 10, 1995, all torts that were alleged to have been committed before April 10, 1993, would be barred by the two year statute of limitations.

Ehrlander does not allege that any of his claims arose subsequent to April 10, 1993. However, Ehrlander asserts that the two year statute of limitations was tolled with respect to his tort claims until he recently discovered evidence.

A cause of action in tort accrues, for purposes of the statute of limitations, when the wronged party knew or had reason to know of his or her injury. Under the current facts, there can be no doubt that Ehrlander knew of the Tinker affidavit at the time it was filed or shortly thereafter. This factual misrepresentation allegedly made by Athens occurred on July 2, 1991. Ehrlander filed the current action in I,995, well after the running of the two year statute of limitations. Accordingly, Ehrlander's tort claim is time barred.

Although factual issues arguably exist with respect to Ehrlander's fraud claims against Athens, these claims are nonetheless barred by statutory immunity and the statute of limitations and summary judgment should be granted in favor of the State.

The Constitutional Claims Ehrlander raises a variety of state and federal constitutional claims against the State and Athens in his individual capacity. Specifically Ehrlander claims that the State violated his rights to due process and just compensation. The State asserts that it cannot properly be sued for either federal or state constitutional claims.

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10. In sum, Ehrlander asserts that since the withdrawal of his counsel, he has personally reviewed the pleadings and applicable law and determined that the previous judgments were entered in error. Because Ehrlander only recently read all of the court documents, he asserts that this newly discovered evidence gives rise to his claim.

1. Claims Against The State

The State argues that it cannot be sued for federal constitutional violations. While federal constitutional tort actions are authorized under 42 U.S.C 1983,[11] the State is not a "person" for purposes of section 1983 liability. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989).

Further, with respect to the state constitutional claims, neither the Alaska Supreme Court nor the Alaska Legislature has recognized or created a damages remedy for state constitutional violations. *Vest v. Schafer*, 757 P.2d 588, 598-99 (Alaska 1988). See also, *State v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 635 (Alaska 1989). Ehrlander does not offer authority to the contrary. Instead he asserts that it is "high time" the courts recognize state constitutional actions against the State. Ehrlander's personal opinions concerning the status of the law are insufficient to support his claim. His state and federal constitutional claims against the State must fail.

11. 42 U.S.C sec. 1983 (1981) reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ehrlander raises a claim against Athens individually for civil rights violations under 42 U.S.C. §I983. Specifically, Ehrlander asserts that Athens wrongfully effected a taking of his property without just compensation or due process in violation of the federal constitution. The State counters that this claim is barred by absolute quasi-prosecutorial immunity and qualified good faith immunity.

The United States Supreme Court has held that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Mitchell v. Forsyth*, 472 U.S. 51.1, 525 (1985)(quoting *Harlow v. Fitzgerald*, 457 U.S. 808, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982)).

The doctrine of qualified immunity bars a section 1983 claim against a public employee unless a clearly established federal right is shown to have been violated. *Mitchell v. Forsyth*, 472 U.S. 51I, 526 (1985). In order to defeat a qualified immunity defense, a plaintiff must make a two-fold showing:

> first, that a defendant's conduct violated federal law; and, second, that such law was clearly established when the alleged violation occurred. [citation omitted] In order to satisfy this burden, a plaintiff must do more than identify in the abstract a clearly established right and allege that a defendant has violated it. "The 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right.'"

Spielman v. Hildebrand, 873 F.2d 1377, 1383 (IOth Cir. 1989) (citations omitted). Ehrlander has failed to present cognizable evidence of any clearly established federal rights violations.

In his complaint, Ehrlander alleges that Athens violated his rights to just compensation and due process. In support of these constitutional claims, Ehrlander essentially repeats his condemnation/inverse condemnation arguments, asserting that Athens failed to fairly compensate him for the taking of his property. As discussed above, these claims have been fully litigated and decided, are accordingly barred by *res judicata*. Further, in light of the Alaska Supreme Court's prior finding that Ehrlander was fairly compensated for the State's taking of his property, Ehrlander's assertions that Athens violated his just compensation and due process rights are unsupported.

Inadequate Representation

Ehrlander argues that he is entitled to a new trial because he was inadequately represented by his attorney:

> When represented by an attorney, he is in full charge of the litigation, and rightly so, he is the expert in a very complicated process. My attorney as well as both the lower and higher courts were adversely effected by the States instructions, as the ultimate authority on how to appraise property for condemnation, on how to deal with this case. we all relied on the state's instructions and should have the right to do so. My attorney also belonged to the good old boys club, and would not inform the Courts

> on known misconduct by his fellow college [sic]. . . . On several occasions, I asked my attorney why he did not respond to the State's unethical conduct, his reply was that he was not interested in getting involved in mud slinging or that sort of irresponsible litigation. He insisted on litigating the case on the facts and he was naive enough to believe that his word would carry equal weight to that of the State's attorneys. . . .

Although Ehrlander may possibly have a claim against his former attorney for malpractice, "ineffective assistance of counsel" is not a ground for setting aside a civil judgment. *Nelson v. Jones*, 781 P.2d 964, 968 n.3 (Alaska 1989).[12]

Breach of Fiduciary obligations

Ehrlander argues that the State has a fiduciary obligation to be fair and ensure just compensation. Ehrlander cites to no authority which states that the State owes a fiduciary duty to adverse parties, and no case law exists which supports this position and authorizes an independent action for damages.

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12. In addition, Ehrlander is chargeable with any negligence an the part of his attorney for statute of limitations purposes.

> Insofar as "constructive notice" and "diligent investigation" affect the computation of the limitations period, the plaintiff is generally charged with the lapses of attorneys acting in his behalf.

Pedersen v. Zielski, 822 P.2d 903, 907 n. 5 (Alaska 1991) (quoting *Gutierrez v. Mofid*, 39 Cal.3d 892, 218 Cal.Rptr. 313, 318, 705 P.2d 886, 891 (1985)).

Based upon the above quotation, Ehrlander's "discovery rule" argument discussed above, must also fail.

Ehrlander's "Thief Theory"

In addition to the fraud claims against the State and Athens, another theory that Ehrlander raises which was not raised during previous proceedings[13] is "The Harassment Immunity Evil Fraud Theory (Thief Theory)" which appears to be a theory created by Ehrlander:

> The State now adopted a new theory for condemning private land in Alaska. It is known as the THIEF Theory where they take and damage private property without compensation [sic] the owner. It is strictly based on their alleged immunity as opposed to the merits of the case. There is actually some legal Support for the THIEF Theory, but it is often followed by a revolution. . . .

In support of this undefined theory, Ehrlander cite: to Alaska *DOT v. Ehrlander*, 792 P.2d 629 (Alaska 1986). [14] He states that this is the only case he could find supporting the THIEF theory, but he knows there are more.

CONCLUSION

Ehrlander's condemnation/inverse condemnation claims merely restate the legal and factual issues fully decided in the prior litigation. These claims are barred by *res judicata*. The fraud claims against Athens

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13. The fraud claims, as well as all of Ehrlander's other claims, are now pending in two appeals before the Alaska Supreme Court in S-6075 and S-6076.

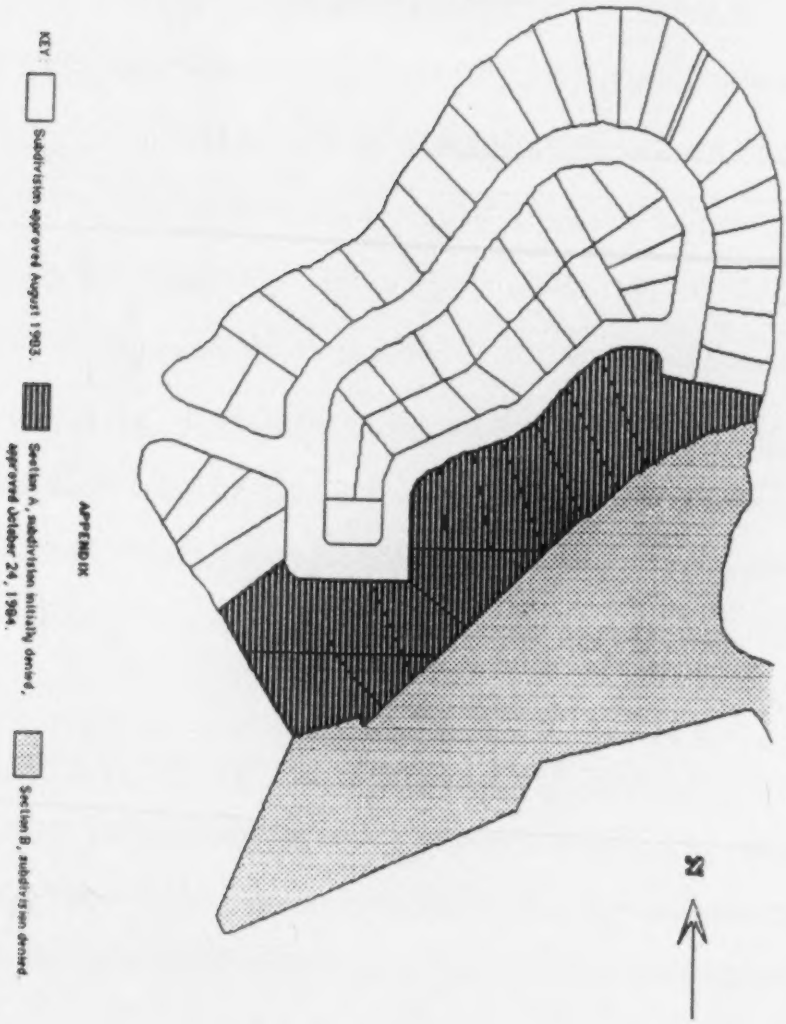
14. Presumably Ehrlander is referring to Ehrlander v. State Dept. of Transp., 797 P.2d 629 (Alaska 1990).

are barred by both statutory immunity and statute of limitations. Finally, the constitutional claims are barred based on *res judicata* and immunity. Summary judgment is GRANTED in favor of the State as to all claims against it.

DATED at Fairbanks, Alaska, this 13 day of December, 1995.

Richard D. Savell, Superior Court Judge

APPENDIX



MINUTES OF THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Lars Ehrlander v. State of Alaska

Case No. F96-0021 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management: 271-3235*

PROCEEDINGS: ORDER FROM CHAMBERS

Lars Ehrlander ("Ehrlander") sues the State of Alaska ("State") and various of its agents and officers asserting claims under 42 U.S.C. Sec. 1983. This court has jurisdiction. 28 U.S.C. § 1343.[1]

Defendants move to dismiss, asserting various grounds. Docket Nos. 15, 23. The motion is opposed and Ehrlander requests oral argument. Docket Nos. 22, 30. After reviewing the record, the Court concludes that oral argument will not be helpful. D. Ak. LR .1(i). All of Ehrlander's claims against the State must be dismissed on the basis of Eleventh Amendment immunity. We must then turn to Ehrlander's claims against certain state agents in their personal capacity. The *gravamen* of Ehrlander's claim is that the State condemned his property and did not pay him what it was worth. The State correctly points out that all of the issues in this case have been litigated in state court and judgments entered. See *Ehrlander v. State of Alaska*, 797 P.2d 629 (Alaska 1990); 4FA-95-870 Civil; 4FA-86-2287 Civil; and 4FA-86-886 Civil.

Those judgments are binding on both parties under the doctrines of *res judicata* and collateral estoppel. *See, e. g.* , *Eilrich v Remas*, 839 F.2d 630 (9th Cir. 1988) (if issues have been litigated in state court or before state administrative agency and state would give them preclusive effect, the federal court must give state determinations preclusive effect). The State concludes that Ehrlander is bound by the various actions in which he has litigated these issues. Diedrich v. City of Ketchikan, 805 P.2d 362, 369-70 (Alska 1991). It is important to mention that the state court decisions are binding on the parties, whether they are correct or not. If Ehrlander received ineffective assistance of counsel, *i.e:* , was the victim of malpractice, his remedy is an action for malpractice in state court. Absent diversity of citizenship, Ehrlander cannot sue his attorney in federal court.[2]

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[1] The St[illegible] correctly points out that the First Amendment bars any action at law or in equity against the State, its agencies, and its officers in their official capacity. The State is not a "person" for purposes of Sec. 1983. Thus all of these claims must be dismissed.

[2] Ehrlander essentially makes four claims. First, he was not paid what his property was worth. The value of the property and the circumstances surrounding the acquisition were thoroughly litigated in state court and the judgments in those cases are res judicata, which means that, as to such issues, Ehrlander cannot litigate any issue that could have been raised and considered. Res judicata is not limited to that were actually raised. Second, Ehrlander argues a number of tort claims which cannot be brought in federal court absent diversity of citizenship. Third, Ehrlander asks, in effect, for this Court to

IT IS THEREFORE ORDERED:

The motion for summary judgment at Docket No.15 is GRANTED. The Clerk of Court is directed to enter judgment in favor of the State and its officers and against Ehrlander dismissing his action with prejudice. Each party shall bear its own costs. The motion to reject service at Docket No. 13 is DENIED as MOOT since this entire case is dismissed. The motion to set the record straight at Docket No. 25 is moot and is therefore DENIED. The motion for judgment on liability at Docket No. 22 is moot and is therefore DENIED. [3] The request for oral argument at Docket No. 30 is DENIED. The motion to inform the court of new important discovery at Docket No. 31 is DENIED.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge.

DATE: June 26, 1996

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review decisions of the state court and particularly Judge Savell's failure to recuse. Docket No: 31. This Court has no jurisdiction to review decisions of state courts applying state law. Finally, Ehrlander claims he was denied due process the state and its agents fooled the state court. Claims of this kind must be litigated in the court allegedly fooled. Ehrlander's claims of fraud on the courts are simply arguments that the courts made the wrong decisions in his cases. Such claims cannot be litigated in federal court.

[3] The decision in this case is without prejudice to Ehrlander's pending litigation in state court.

MINUTES OF THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Lars Ehrlander v. State of Alaska

Case No. F96-0021 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management: 271-3235*

PROCEEDINGS: **ORDER FROM CHAMBERS**

On July 15, 1996, this Court issued an order denying Lars Ehrlander's motion for reconsideration. Docket No. 36. The Court now sets out an explanation regarding denial of the motion for reconsideration.

Ehrlander sought reconsideration of this Court's order dismissing this action with prejudice to further action in federal court pending final decisions in the state court and with prejudice to further proceedings in any court regarding issues that were litigated or could have been litigated in prior state proceedings. Docket No. 35. Ehrlander raised no new issues. Takings claims are not ripe until they have been presented to the state courts. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Jones Intercable of San Diego v. City of Chula Vista*, 80 F.3d 320, 323-24 (9th Cir.1996). Any claims that were submitted to the state court or could have been submitted to the state court are barred under the doctrine of *res judicata*. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir.1993). This Court

was of the view that all of Ehrlander's claims had either been presented to the state courts and rejected on their merits or should have been submitted and were therefore-within the doctrine of res judicata.

Alternatively, the claims are not ripe. Ehrlander has hardly shown that the Alaska court's treatment of inverse condemnation claims renders resort to state courts futile. See, e.g., *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996). Further, to the extent that Ehrlander is making claims against the State or its officers in their official capacity his claims are barred by the Eleventh Amendment. Such claims could be pursued in the state court. Finally, Ehrlander argues that he has claims against certain state officials in their personal capacity that do not relate to the taking of his property in inverse condemnation but relate to unfair manipulation of the state judicial proceedings. Such claims are also not ripe until they have been presented to the state courts and the state judgments have been set aside. See, e.g., *Heck v. Humphrey*, 114 S. Ct. 2364 (1994). While Heck deals with claims alleging actions whose unlawfulness would render a conviction or sentence invalid, there is no reason not to apply its rationale to claims alleging actions whose unlawfulness would render a state civil judgment invalid. The Alaska Supreme Court is prepared to set aside a judgment which resulted from a fraud on the court. See, e. g.

, *Higgins v. Municipality of Anchorage*, 810 P.2d 149 (Alaska 1991); *Allen v. Bussell*, 558 P.2d 496 (Alaska 1976).'

In reviewing the order at Docket No. 32, it became clear that a typographical error occurred in n. 1 where the reference to the First Amendment clearly should have been a reference to the Eleventh Amendment. The First Amendment has absolutely nothing to do with this case.

IT IS THEREFORE ORDERED:

Footnote 1 in Docket No. 32 is amended to replace the reference to the First Amendment with a reference to the Eleventh Amendment. In all other respects, the motion for reconsideration at Docket No. 35 is DENIED.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge.

DATE: July 19, 1996

' Ehrlander reties on *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir.1995). In *Dodd* the parties specifically reserved certain issues to be decided in a federal court proceeding that was pending at the same time. Here, while there may have been a bifurcation of issues as Ehrlander contends, they were separated for later consideration in the state court, not the federal court, and as Ehrlander concedes, subsequent judgments were entered. In fact, the final judgment found that all of Englander's claims were barred by res judicata. That decision is in itself res judicata in this Court even if erroneous, as Ehrlander contends, because this Court must give the same preclusive effect to state court

judgments that the state court would, see 28 U.S.C. § 1738, and the state courts give preclusive effect to decisions, even if erroneous, including decisions resolving constitutional claims. See, also, 28 U S. C. § 1738; *DeNardo v. Johnstone*, 772 F. Supp. 462 (D. Alaska 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

Alaska Const. Art. 1. Sec. 1. Inherent rights. . . .all persons have natural rights to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law...

A.C. Section 6., Petition. The right of the people to petition the government shall never be abridged.

A.C. Section 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

A.C. Section 14. Searches and seizures. The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures shall not be violated.

A.C. Section 16. Civil Suits: Trial by jury. In civil cases where the amount in controversy exceeds two hundred and fifty dollars, the right to trial by a jury of twelve is preserved to the same extent as it existed at common law...

A.C. Sec. 18 Eminent domain. Private property shall not be taken or damaged for public use without just compensation.

US Constitution Article 3, Section 2. The judicial power shall extend to all cases. No State may infringe on rights protected by the US Constitution.

Article 4 Sec. 1, 2. Citizens of each State shall be treated equally.

Article 6. This Constitution, and the Laws of the United States which shall be made under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound

thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment 1. Congress shall make no law ... abridging ... the right of the people .. to petition the Government for a redress of grievances.

Amendment 5. Due process; eminent domain. ... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 7. In suits at the common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment 8. ... nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 11. The judicial power of the united States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

Amendment 13. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment 14. Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

AS 09.10.070 Establishing Equitable Estoppel. Reliance on misrepresentations result in a party's failing to pursue a remedy timely.

Equitable Tolling. There is no need to pursue two similar remedies at the same time.

AS 09.25.010 Statute of Frauds (a) In the following cases and under the following conditions an agreement, promise, or undertaking is

unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or an agent of that party...

AS 09.25.020 Exemptions to statute of frauds. A contract, promise, or agreement which is subject to AS 09.25.010, which does not satisfy the requirements of that section, but which is otherwise valid is enforceable if

(1) there has been full performance on one side accepted by the other in accordance with the contract; or

(2) there is a memorandum which would satisfy the requirements of AS 09.25.010 except for error or omission in the recital of past events; or

(3) there is a memorandum which would satisfy the requirements of AS 09.25.010 except for error or omission which could be corrected by reformation if it occurred in a formal contract; or (4) the party against whom enforcement is sought admits, voluntarily or involuntarily, in pleadings or at any other stage of this or any other action or proceeding the making of an agreement;

AS 09.40.230 Authorization for injunction. (2) the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done some act in violation of the plaintiff's rights concerning the subject of the action and tending to render the judgment ineffectual.

AS 09.45.630 Actions for recovery of real property. A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover the possession of the property with damages for withholding it.

AS 09.55.310 (1), (2) Hearing.

(1) the value of the property sought to be condemned, and all improvements on it pertaining to the realty, and of each separate estate or interest in it; if it consists of different parcels, the value of parcel and each estate or interest in each parcel shall be separately assessed.

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff...

AS 09.55.320 Right to a jury trial as to damages and value of property. An interested party may appeal the master's award of damages and valuation of the property, in which case there shall be a

trial by a jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal.

AS 09.55.330 Compensation and Damages. For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the bases of damages to property not actually taken but injuriously affected in the case where the damages are allowed....

AS 09.55.370 Final order of condemnation. When payments have been made and the... the court shall make a final order of condemnation...

AS 09.55.430 Content of Declaration of Taking. (3) A description of the property sufficient for the identification of it;

AS 09.55.460 (b) Effect of appeal. The plaintiff may not be divested of a title or possession acquired except where the Court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and the least private injury. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for a period during which the property was in the possession of the plaintiff... restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in value of the property caused by the plaintiff's wrongful possession.

AS 24.40.010 Invalidity generally. A conveyance or assignment, in writing or otherwise, of an estate or interest in lands, or in goods, or things in action, or of rents or profits issuing from them or a charge upon land, goods, or things in action, or upon the rents or profits from them, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages forfeitures, debts, or demands, or bond, or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded is void.

AS 34.40.090 Fraudulent intent question of fact. The question of fraudulent intent in a case arising under the provisions of this chapter is a question of fact, and not of law.

AS 34.55.004 Fraudulent and prohibited practices. It is unlawful for a person, in connection with the offer, sale or purchase of

subdivided land directly or indirectly, to knowingly

(1) employ a device, scheme, or artifice to defraud;

(2) make an untrue statement of a material fact or omit a statement of a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or

(3) engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon a person.

AS 34.55.046 Definitions. (7) "subdivision" and "subdivided land" means land that is divided or is proposed to be divided for the purpose of disposition into two or more lots, parcels units, or interests and also includes any land whether contiguous or not if two or more lots, parcels units, or interests are offered as a part of a common promotional plan of advertising and sale; if the land is contiguous or is known, designated, or advertised as a common unit or by a common name, the land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for disposition as part of a common promotional plan.

AS 34.60.040 Relocation payments.

(1) actual expenses in moving a person, the person's family, business ...

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business...

(3) actual reasonable expenses in searching for a replacement business. (c) A displaced person eligible for payment under (a) of this section who is displaced from a place of business ... and who elects to accept the payment authorized by this subsection in place of the payment authorized by (a) of this section, may receive a fixed payment amount equal to the average annual net earnings of the business ... except that this payment shall not be less than $1,000.00 or more than $20,000.00.. 10

AS 34.60.070 Expenses incidental to transfer of property. ... The State agency... shall reimburse the owner, to the extent the department considers fair and reasonable, for expenses necessarily incurred for

(1) recording fees, transfer taxes, and similar expenses incidental to conveying the real property to the state agency;... AS 34.60.080. Litigation expenses. (a) (c) ... agency ... shall award ... a sum that will in the opinion of the court reimburse the owner for reasonable costs, disbursements, and expenses, including reasonable attorney,

appraisal, and engineering fees, actually incurred because of the condemnation proceeding.

AS 34.60.090 Relocation services. (4) assist a person displaced from the person's business or farm operation in obtaining and becoming established in a suitable replacement location;...

AS 34.60.120(3) Do not consider Decreases caused by the project. "A decrease in the value of property caused by the public improvement for which the property is acquired or by the likelihood that the property would be acquired for the improvement must be disregarded in determining just compensation."

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

AS 34.60.130. Uniform acquisition policy for improvements. ... if a state agency acquires any interest in real property, the state agency must acquire at least an equal interest in all buildings, structures or other improvements located upon the real property which the state agency requires to be removed from the real property or which the state agency determines will be adversely affected by the use to which the real property will be put.

(b) For the purpose of determining just compensation to be paid for a building, structure, or other improvement required to be acquired under (a) of this section, the building , structure, or other improvement is considered to be a part of the real property to be acquired. ... and the fair market value which the building, structure, or improvement contributes to the fair market value of the real property to be acquired...

AS 34.60.150 Definitions. (1) "business" means any lawful activity...

AS 44.88.38 Personal liability. An officer, employee, or agent of the authority may not be held personally liable in a civil action for damages for an act done or omitted in good faith while performing the functions of office, employment, or agency under this chapter. **USCS 23 Sec. 127** (b) -- *Reasonable access.* No State may enact or enforce any law denying reasonable access to motor vehicles subject to this title to and from the Interstate

USC 28 Sec. 1331 The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

USC 28 Sec. 1343 (a) (1, 2, 3, 4,) Civil rights and elective francise

(a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the depravation, under color of law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

USC 28 Sec. 1347 Partition action where United States is joint tenant. The district court shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenant.

USC 28 Sec. 1358 The district court shall have original jurisdiction of all proceedings to condemn real estate for use of United States or its departments or agencies

USC 28 Sec. 1367 Supplemental Jurisdiction

(a) Except as provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include all claims that involve the joinder or intervention of additional parties.

(c) The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises novel or complex issues of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

USC 28 Sec. 1991, 1992, 1995

USC 42 Sec. 1455(c)(1)

USC 42 Sec. 4625

USC 42 sec. 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

USC 42 Sec. 1985 (2) ...if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any matter, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, ...

USC 42 Sec. 1986 Action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . . . but no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

FEDERAL REGULATIONS

49 CFR Sec. 24.101 -- Real Property Acquisition

Sec. 24.101 Applicability of acquisition requirements.

(a) *General.* The requirements of this subpart apply to any acquisition of real property for a Federal program or project, and to programs and projects where there is Federal financial assistance in any part of project cost except for: . . . .

49 CFR Sec. 24.102 -- Basic acquisition policies

(k) *Uneconomic remnant.* If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the Agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. (See Sec. 24.2 (w).)

(l) *Inverse condemnation.* If the Agency intends to acquire any interest in real property by exercise of eminent domain, it shall institute formal condemnation proceedings an not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

49 CFR Sec. 24.103 -- Criteria for appraisals

(a)(2) An adequate description of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), a statement of the known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property.

(3) All relavent and reliable approaches to value consistent with commonly accepted professional appraisal practices. When sufficient market sales data are available to reliable support the fair market value for the specific appraisal problem encountered, the agency, at its discretion, may require only the market approach. if more than one approach is utilized, there shall be an analysis and reconciliation of approaches to value that are sufficient to support the appraiser's opinion of value.

(5) (b) Influence of the project on just compensation. To the extent permitted by applicable law, the appraiser shall disregard any decrease or increase in the fair market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than due to physical deterioration within the reasonable control of the owner.

(e) *Conflict of interest.* No appraiser or review appraiser shall have any interest, direct or indirect, in the real property being appraised for the Agency that would in any way conflict with the preparation or review of

the appraisal. Compensation for making an appraisal shall not be based on the amount of the valuation. . . . .

49 CFR Sec. 24.304 -- *Reestablishment expenses -- nonresidential moves*

In addition to the payments available under Sec. 24.303 of this subpart, a small business, as defined in Sec. 24.2(t), farm or nonprofit organization may be eligible to receive a payment, not to exceed $10,000, for expenses actually incurred in relocating and reestablishing such small business, farm or non profit organization at a replacement site.

49 CFR Sec. 24.306 -- Fixed payments for moving expenses -- nonresidential moves.

(a) *Business.* A displaced business way be eligible to choose a fixed payment in lieu of the payments for actual moving and related expenses and actual reasonable reestablishment expenses provided by Sub Sec. 24.303 and 24.304. Such fixed payment, except for payment to a nonprofit organization, shall equal the average annual net earnings of the business, as computed in accordance with paragraph (e) of this section, but not less than $1,000 nor more than $20,000. . . .

RULES

Rule 72 (3)-- **Dismissal of Action**. *By order of the court.* Any time before compensation for property has been determined and paid, the court may dismiss the action as to that property after motion and hearing, except that the court may not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest taken. . .

Rule 72 (5)f -- Amendment of Pleadings. The plaintiff may amend the complaint without leave of court at any time before trial of the issue of compensation and as many times as desired . . . .

Rule 72(2)(iv) -- a description of the property to be taken sufficient to identify and locate it; that each interest taken, to "each separate piece" of property be specified.

MISCELLANEOUS

Right to earn livelihood -- A property right.

Fraud in consideration -- Misrepresenting something being bought or sold. By benefiting from half of the Bifurcation Agreement, the State purchased developed land at the price of undeveloped land.

Chapter 17.10.020 Jurisdiction; "Subdivision" Defined.

Fraud in inducements -- inducing us, in order to compromise our position, to enter an agreement that the state had no intention of honoring.

HOW THE FEDERAL QUESTIONS WERE RAISED IN THE STATE COURTS

NOTE: This is one of a multitude of times when I raised the federal issues. More can be provided. I made approximately 15 motions to the Alaska Supreme Court requesting leave to litigate the federal questions. All were denied without giving a reason.

THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA D.O.T., Appellant, Cross-Appellee,
V.
LARS EHRLANDER, Appellee, Cross-Appellent.

Supreme Court No. S-7135.
August 8, 1996

RULE 506 (A, B, C) PETITION FOR REHEARING

Regarding the July 31, 1996 Memorandum Opinion and Judgment, I ask the Court to reconsider the following:

1. Can the value of the land in 1986, the end of a boom era, that was appraised by including the decreases attributed to the highway project and where the value of the improvements were specifically excluded, constitute just compensation for property taken in 1984, in the midst of a boom era, before it became impaired and that had the improvements included.

3. Considering that this case spans over a period of 10 years, and a 10% percent simple interest would only provide for a 1% user fee a year of the money, a return substantially below anything reasonable is fair.

3. *Should Ehrlander Receive "Full Subdivided Value" for the property? -- No. Ehrlander did not appeal the verdict in case 886.* The issue of whether the property was subdivided **was not part of the 886 case**; it had been bifurcated to a future trial[1]. It seems harsh to require a party to appeal part one in a split case on the issues that were bifurcated to part two and to raise this requirement to a level beyond the constitutional provisions of compensation for what the State takes. The fact is that the jury was not asked to appraise the improvements to the property, but only the

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[1] . . . upon stipulation of the parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the above-captioned case shall be bifurcated, with the condemnation case, pertaining to the summons and complaint filed on April 29, 1986, being tried during the week of December 7, 1987, and under the appropriate provisions of the existing pretrial order. IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the inverse condemnation taking case, with respect to the complaint filed by Lars Ehrlander, shall be reassigned for a trial date subsequent to the condemnation case, and that the issues to be determined in that case shall be the damages and compensation due Ehrlander for the period of time from August 24, 1983 until April 29, 1986. . . .

raw land[2]. My company had spent two years installing a sewer and water system, fire hydrants, electric, cable and telephone systems, and roads and drainage systems. We had performed engineering work, plotting work and we had paid the city assessments for the whole area. This work was completed, approved by the city and paid in full by me. It is true that this Court has previously stated that *just compensation has been established in the first trial.* It is also true that in the same opinion this Court stated that *impairments attributed to the highway project should not be included when determining the value.* The property would have consisted of 15 lots but for the highway project, yet, the Court provided no remedy for this injustice. It consisted of four lots when taken and was appraised as one lot.

I do not disagree that the jury found just compensation for the property they appraised. However, **the State took additional property that has not been appraised by a jury**; the mechanical improvements, material and labor and the enhanced value attributed by those improvements. These are **separate issues** from appraising the raw land in the first trial. The bifurcated issues of " Damages" and "Decreases" originated in the formal case, the former arises from our

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[2]Even though the jury was asked to consider the land as suitable for subdivision development, they did not appraise it as such. It is similar to asking the jury to appraise a pile of lumber as a house because it is suitable for that purpose.

state Constitution, and the latter from AS.34.60.120 (3). Neither is dependent on an inverse taking.

Clearly it was proper to bifurcate the issues, dealing with "subdividing the property" to a second trial **as they involved a third party**, all parties agreed to bifurcate the issues, and the agreement was reduced to a court order. I have now initiated a new case, 4FA-95-870, on the bifurcated issues and some other post trial issues. It was my intention to try the bifurcated issues in this case ("Lange trial"), but because of the narrow scope of this case it was not possible. I am submitting my opening brief in the sister case for clerk scrutiny today. Even though it includes some other post trial issues, I would prefer to waive those issues and try the bifurcated issues in this case.

Further, the Court's finding that *"just compensation has been established in this case by the verdict of a jury,"* came as a result of the State attorney's fraudulent misrepresentation of the facts of the case. On page 18 in the February 3, 1993 Brief of Appellee, for example, the State says:

> "In order to be valued as subdivided lots, and to introduce such evidence of value, the individual lots must be available as separate units for sale. Id. at 571. With respect to Ehrlander's property, at the time of taking the land was not subdivided, and no individual lots could be marketed.

See Judge Steinkruger's finding in her February 3, 1993 FINDINGS OF FACT AND CONCLUSIONS OF LAW page 21:

> 40. As to that property which the State indicated it would be acquiring for the Geist Road Extension -- that property which the State formally condemned in 1986 -- after the platting of the First Addition 1984, the property remained subdivided into four separate tax lots ranging in size from 1/2 acre to 2.5 acres (Section B). These tax lots were of the same size and were improved to the same extent as Ehrlander's typical sale in Royal Court Village or Royal Court Village, First Addition. Ehrlander was legally entitled to sell the tax lots without further Borough action" (emphasis added).

The State attorney's statement was fraudulent (See Steinkruger finding above) and it is clear that this Court was influenced by this misrepresentation. Even in the most recent, July 31, 1996 Opinion, this Court refers to the property in its pre-highway condition:

> We also note that before the highway project, there was no Section A and Section B, but it was all one piece of property to be subdivided.

That is what the State has said, but it is not true. The property was annexed to the city in 1983 on my request. The annexation agreement required me to improve the property to city standards, and I did. The property consisted of five lots when I bought it in 1983, and after the annexation in 1983-84, it consisted of 5 improved city lots subject to all city service. In other words, it was part of the City of Fairbanks. When the Royal Court Subdivision was approved in 1984, the property the State eventually took was again subdivided and consisted of 4 or 5 city lots, depending on whether one counts a decreeded lot that the State bought separately for $4.95 sf. . The State gave an erroneous description of the property to the jury and they

emphasized the point by naming the defendant as "6.313 Acres, more or less ". . . There has been several more misrepresentations. The point is that this Court's findings are based on factual misrepresentations by the State.

The Court, on page 3 stated:

> Former decisions will not be reconsidered absent 'exceptional circumstances,' a term which refers to clear error constituting a manifest injustice.

The State has taken property that I spent two years improving at a cost of several hundred thousand dollars. Because I did not appeal from the first trial issues that had been removed by stipulation to a second trial, we have lost all rights to those issues. The end result is that the State took the land as impaired by the highway project for less than my cost, and as a result my family had to pay for this land with our working capital and savings. We lost our business, creditworthiness and became subject to a judicial foreclosure, as we received less for the land than what we owed to the bank. The State ended up taking the improvement without any compensation violating every Statutory appraisal provision in the book, including several federal and state constitutional provisions. We had to sell our home to pay for this public project, and I had to take a loan from my parents to get going again. I have been in a state of deep depression and apathy for the last ten year that should have been the best years of my life, all for a

technicality I can not comprehend. I do not understand that this Court does not find a "manifest injustice" in my case. When I became a naturalized citizen and when my son entered the Naval Academy we had to swear to uphold the Constitution as if it represented the ultimate right. Yet, this Court appears to take the position that the ultimate right rests on this rule, with which I am not familiar, that I must appeal issues that have been bifurcated, in the case from which they were bifurcated.. I ask the Court to reconsider these issues.

Signed in Fairbanks, Alaska, this eight day of August, 1996.

By: Lars W. Ehrlander, pro se

EVIDENCE OF IMPAIRMENTS RESULTING FROM THE HIGHWAY PROJECT

Case 4FA-86-886 CI

October 5, 1987

JUDGE BLAIR'S OPINION AT HEARING:

On Motion for Partial Summary Judgment and Opposition to Motion to Dismiss.

beginning on page 17:

MR. ANDREWS: At the time Mr. Ehrlander applied, in fact the State statute said that selling lots in a subdivision without prior approval was a misdemeanor in fact. I think that's been taking out, but.....

THE COURT: Well, why did they turn down the subdivision in this case?

MR. ANDREWS: The Borough has to concede it was turned down because of the Geist Road Extension going through. The record shows that. We were.....

THE COURT: So that's really the key, isn't it, the argument that there could have been other reasons for turning down the subdivision, so what? That isn't the reason it was turned down.

And on page 28 State attorney Mr. John Athens admits:

MR. ATHENS: It would have cost the State more,...

ACQUISITION SERVICES, INC.

Mr. Gary Vancil, Attorney
P. O. Box 75373
Fairbanks, AK 99707

December 3, 1987

Re: Appraisal of Parcel 20-A [Ehrlander)
Project No. RS-RRS-M-OOOSIS2)
Geist Road Extension: Peger to College

Gentlemen:
As you requested, I am transmitting, herewith, in triplicate, my appraisal report of 85 pages for the above-noted property. The purpose of this appraisal is to estimate Just Compensation for a proposed partial acquisition from the subject property for roadway purposes. The subject property is a vacant and unimproved tract (except for road and utility site work) that was purchased for residential subdivision purposes in 1983 as part of a larger parcel. A subdivision proposal for the entire property was submitted to the Fairbanks North Star Borough. However, apparently because of their awareness of the possible eventual

need for o potion of the subject property, they have not allowed the southerly 1/3± of the property to be developed. while the intent of the Borough's decision is admirable, the legality appears questionable. Therefore, the subject property bas been appraised as a vacant and unimproved acreage tract with a highest and best use for residential development. It has not been appraised as a subdivided parcel, because it is not, and because the hindrance to development has occurred due to a Borough decision and not a State decision. Just Compensation is defined, herein, as the difference between the market Value Before the Taking and the Market Value after the Taking, and includes compensable damages, if any, offset by special benefits, if any, to the maximum amount of the damages. With consideration to all of the essential facts regarding the subject property, as well as present economic and market conditions in the area, it is my opinion that the Just Compensation to be paid as of the date of appraisal, is:

JUST COMPENSATION ESTIMATE

FIVE HUNDRED TWENTY FOUR THOUSAND

DOLLARS

($524,000.00)

Thank you for this interesting and challenging assignment. If you have any additional questions, don't hesitate to contact me.

Very truly yours,
Gary Hoagland, SREA, MAI

DEVELOPMENT APPROACH:

Gross Sales Price of Developable Land:

The adjacent Royal Court Village Subdivision, reflects sales of development land that occurred between 1983 and 1987 from $4.00/sf to $4.95/sf, the increase according to the developer being directly attributable to holding costs. Many of the lots originally subdivided have been assembled to form larger building sites to accommodate multi-residential development. Rather than retail sales on a site basis, it appears that the square foot price is the basis utilized for this development. The most recent indication is an option to purchase Block 3 for $4.95/sf. This block is located immediately adjacent to the proposed acquisition (Geist Road Extension). Since this is the most current evidence of retail sale price, it is reasonable to assume that the developable land that would exist if the area to be acquired by the Department of Transportation were subdivided would reflect a retail sale price of $4.95± sf.

Since the larger parcel contains 336,065± sf (7.715 acres), the developable area is estimated to be 336,065± sf x 75% or 252,049± sf say 252,000± sf. Total gross retail sale price is therefore 252,000± sf x $4.95± /sf or $1,247,400.

SUBDIVISION APPROACH SUMMARY

Assumption: 2 year program with an equal number of lots sold each year. All development is compleated at the beginning of the program.

Total developable area = 252,000± sf.

Year:	1	2
Gross Sales Revenue/year:		
126,000± sf x $4.95±/sf=	$623,700	$623,700
Less: Sales and Closing Costs (10%)	62,370	62,370
Net Sales Revenue	$561,330	$561,330
Less:		
Overhead & Professional Fees (21/2%):	15,592	15,592
Development Cost Remaining:	25,000	-0-
Financing Costs (12% interest, 2% loan cost):	49,896	37,422
Real Estate Taxes:	750	750
Developer's Profit (20%)	124,740	124,740
Cash Flow:	$345,352	$382,826
Discounted for 1/2± year @ 15%/year:	$321,258	
Discounted for 11/2 years @ 15%/year:		$309,667

Total Estimated Market Value: $321,258+ $309,667 = $630,925
($630,925 : 336,065 sf = $1.88± sf)
[Rounded of to $1.79 sf]

CHANGE TO CONDITIONS AND SERVICES:

Mr. Hoagland, state appraiser April 13, 1988.

This Amendment is necessary to provide a concise written report on parcel 20A to establish the following facts: (1) The date of taking the court alleges took place prior to the State's date of taking on said parcel; (2) To determine whether any business losses occurred as alleged by inverse proceedings; (3) To provide engineering costs; (4) To determine compensation, if any. (5) To determine if any diminution of

value to property took place as a result of taking; and (6) To establish damages, if any. . . .

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander , plaintiff,
v.
State of Alaska and Public Facilities, Defendants.

Case No. 4FA-86-2287 Civil

AFFIDAVIT OF GLENN POTTS, State appraiser

Glenn Potts, being first duly sworn, deposes, and says:

1. He has knowledge of the facts herein.

2. I was employed by the State of Alaska as a real estate appraiser in 1983 and 1984. In this capacity, I was asked by the State in late 1983 or early 1984 to establish the fair market value of an area of Lars Ehrlander's property south of the proposed Geist Road Extension which the State was contemplating selling to Golden Valley Electric Association after the State acquired the property from Mr. Ehrlander.

3. After thoroughly examining the area and the pertinent market, I estimated that the fair market value of the property was $4.50 per square foot, as set forth in Exhibit 1 to this affidavit.

4. Property such as that which Lars Ehrlander sought to subdivide for residential purposes in 1983 and 1984, but could not due to the

pendency, of the State's Geist Road Extension (now the Johansen Expressway), is particularly vulnerable to substantially impaired marketability due to pending acquisition by the State since families and other with long term housing needs rarely, if ever, desire to purchase, lease, rent, or otherwise obtain an interest in property when that interest may be destroyed in a forthcoming condemnation, necessitating those persons to incur the hardships attendant in moving and obtaining other property to satisfy their housing needs.

5. The Alaska Statutes, AS 34.60.120(3) (Exhibit 4), requires that for just compensation purposes property be appraised without including any decrease in value due the pendency of the project for which it is eventually acquired. The State of Alaska's appraisal by Gary Hoagland which the State utilized in the formal condemnation case, 4FA-86-886 Civil, however, failed to exclude the decrease in value .to Lars Ehrlander's property resulting from the pendency of the Geist Road Extension, but instead specifically included the decreased, depressed value in its determination of just compensation. This fundamental error in Mr. Hoagland's appraisal is evident on its very face as indicated in the cover letter to the appraisal, a copy of which is attached as Exhibit 2 to this affidavit. Only by virtue of the Stipulation and Order (Exhibit 3) reserving for the above-captioned case the damages to Mr. Ehrlander's property due to

the pendency of the State's Geist Road Extension, could the prejudicial effects of Mr. Hoagland's appraisal and testimony be cured. FURTHER AFFIANT SAYET NAUGHT.

Sworn on December 11, 1991 Glen Potts, Affiant

Value of Ehrlander's Property - Estimate (by Glen Potts)

It is estimated that the Right of Way (ROW) will encompass 3.8± acres or 165,000 sq. ft. and an uneconomic remainder of 3.5± acres or 152,460 sq. ft. will lie between the road and railroad. Due to actions initiated by the Borough without the Department of Transportation's (DOT & PF) concurrence, this Ehrlander property of 23.3± acres was only Partially subdivided. It is assumed that the property must be appraised as though totally subdivided and DOT & Pf. were purchasing individual lots on the basis of $4.50 per sq. ft. Prior to deriving a value for the areas needed for the project, net subdivision lot areas must be calculated and development cost not incurred to date must be subtracted from the gross square foot lot cost. After all these factors are considered, it is my opinion that the value of the ROW is $330,000. and the damaged uneconomic remainder is $290,000 for a total of $620,000.

The potential value of the uneconomic remnant in assemblage to the Golden Valley Electric Association (GVEA) holdings with an industrial use is estimated to be $1.00/sq. ft. or $152,460. the degree of

need that GVEA might have for this parcel is unknown. They have indicated a desire to purchase at a bargain price. I will assume that a price of 50 cent on the dollar would be a sufficient amount to entice GVEA to purchase. Therefore, the value of the remainder is $75,000(R.).

Signed Glenn Potts

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander , plaintiff,
v.
State of Alaska and Public Facilities, Defendants.

Case No. 4FA-86-2287 Civil

AFFIDAVIT OF KARL SOPP

Karl Sopp, being first duly sworn, deposes, and says:

1. He has knowledge of the facts herein.

2. I have been a professional real estate appraiser in the Fairbanks area for the last eighteen (18) years.

3. I am an appraiser who has obtained a MAI designation.

4. I am familiar with that property owned by Lars Ehrlander, which property was formally condemned by the State of Alaska for its Geist Road Extension in a condemnation action commenced April 29, 1986, Case No. 4FA-86-886 Civil. I am likewise familiar with Lars Ehrlander's efforts to subdivide said property in 1983 and 1984, and

that said subdivision was. denied due to the pendency of the State's Geist Road Extension.

5. In 1983, as indicated in Exhibit 1 to this Affidavit, Title 17 of the Fairbanks North Star Borough Code of Ordinances prohibited Lars Ehrlander from selling land which was subject to be subdivided but which was not yet subdivided.

6. It is a well-established fact that property, such as that which the State of Alaska formally took from Mr. Ehrlander in 1986 which is suitable for subdivision or other development but which is subject to the threat or other distinct possibility of pending Condemnation is substantially impaired in marketability and correspondingly decreases in value. This is demonstrated further by the severely-impaired value Lars Ehrlander received for his property in the former condemnation case, 4FA-86-886 Civil, $1.79 per square foot as compared to the finished lots up to $4.95 per square foot which Lars Ehrlander was receiving for his adjacent property which was not blighted by the pendency of the Geist Road Extension. Lars Ehrlander's property was therefore not able to be appraised to its highest and best use as subdivided residential lots, similar to the adjacent parcel where lots were selling as high as $4.95 a square foot.

7. As a matter of law (Exhibit 2) and a point of proper appraisal practice, decreases in a property's value due to the pendency of the

project for which it is eventually acquired are not be considered in appraising and otherwise valuing the property for just compensation purposes.

8. I am familiar with the appraisal of the State's appraiser Gary Hoagland and with the jury's verdict based thereon. Mr. Hoagland's appraisal and the corresponding jury verdict failed to exclude those decreases in the value of Lars Ehrlander's property which occurred from August of 1983 through April 29, 1986 as a result of the pendency of the State's Geist Road Extension. The State's case and the evidence presented appears not to acknowledge that the pendency of the Geist Road Extension was the only reason that prevented Mr. Ehrlander from subdividing and developing the land to its highest and best use The threat of condemnation prevented the Borough from approving the plat. Accordingly, at the formal condemnation trial, Lars Ehrlander did not receive the fair market value for his property but received a value as if the property were not improved to its highest and best use as a residential subdivision, but rather as unimproved parcel depressed by the effects of the pending Geist Road Extension. It thus also appears that the State did not compensate Lars Ehrlander for the loss of profit potential and the additional costs associated with the portion of the subdivision that was

not completed due to the pendency of the Geist Road Extension. See Exhibit 3.

FURTHER AFFIANT SAYETH NAUGHT.

Sworn by Karl Sopp, affiant on December 11, 1991

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander , plaintiff,
v.
State of Alaska and Public Facilities, Defendants.

Case No. 4FA-86-2287 Civil

AFFIDAVIT of Herb Mann, Borough Planning Officer.

Herb Mann, being first duly sworn, deposes, and says:

1. He has knowledge of the facts herein.

2. I am a Platting Officer for the Fairbanks North Star Borough (Borough) and was Platting Officer for the Borough during 1983 and 1984.

3. In August of 1983, in my capacity as Borough Platting Officer, I became familiar with Lars Ehrlander's attempts to subdivide property for residential housing known as Royal Court Subdivision.

4. During August 19, 1983 meeting between State and Borough personal, the State Department of Transportation represented that it would be paying for the take and expediting the process "to help Mr. Ehrlander out," (see extracts of minutes of the Platting Board

attached to this Affidavit as Exhibit 1). In this regard, the State represented to me that although the location of the road within the right-of-way was not exact at that time, the right-of-way itself was definite, being that which went through Mr. Ehrlander's proposed subdivision. This is evidenced in my explanation to the Platting Board, attached as Exhibit 2 to this Affidavit.

6. (sic) I recommended to the Borough Platting Board on August 24, 1983, to deny Mr. Ehrlander's subdivision, as vacating and redesigning of an approved subdivision would be necessary to accommodate the Geist Road Extension routing.

7. A meeting was held between August 24 and September 14, 1983, with the State Department of Transportation and Public Facilities (State DOT/PF) personnel, Borough personnel, the engineer for Mr. Ehrlander, and others, concerning Mr. Ehrlander's proposed subdivision. At the meeting, State DOT/PF personnel again represented to me that the State would be acquiring portions of Mr. Ehrlander's property south of the red line for the Geist Road Extension, as also indicated in Exhibit 3, and added that the expediting of the acquisition would be through an advance acquisition process, as also indicated in Exhibit 4 and 5.

8. On the basis of the State's representations of its intent to acquire Lars Ehrlander's property on an expedited basis through the

advanced acquisition process, State representations which I conveyed to the Platting Board on September 14, 1983, the Platting Board denied Mr. Ehrlander's subdivision in the area.

9. The State's representation and actions with respect to Lars Ehrlander and his proposed subdivision led me to conclude that as of the fall of 1983, it was the State DOT's unequivocal intent to take Mr. Ehrlander's property.

FURTHER AFFIANT SAYETH NAUGHT.

Sworn by Mr. Herb Mann, affiant, on December 11, 1991

EVIDENCE OF THE PROPERTY BEING IMPROVED

CITY OF FAIRBANKS

February 5, 1987

Subject: Royal Court Village

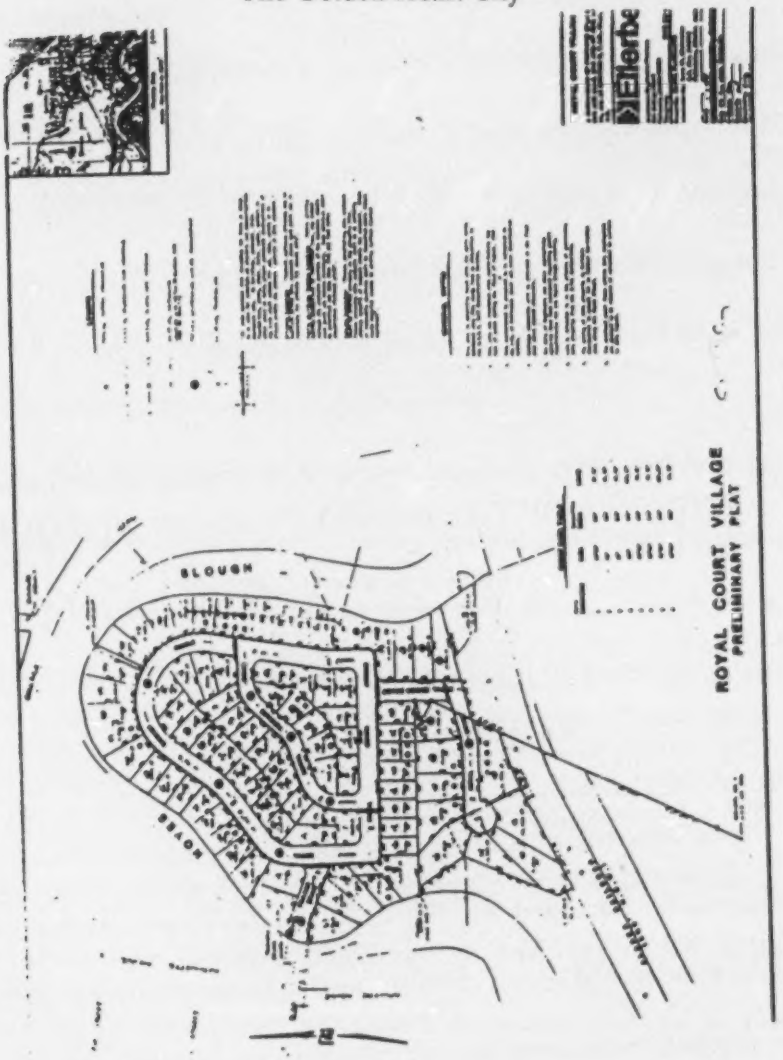
Dear Mr. Ehrlander:

In response to your recent inquiry, sewer and water connection charges were calculated on the basis of the City providing water for distribution and sewer treatment service to the property as shown on the attached preliminary plat for Royal Court Village. The charges were specified in the annexation ordinance (see attached Ordinance No. 4265, adopted September 12, 1983) and payment was received in the full amount of $44,137.22 on July 5, 1984. The sewer and water

system constructed has the capability of providing sewer and water service to the entire subdivision as shown on the preliminary plat.

Sincerely, J, C. Phillips, City Engineer

"The Golden Heart City"



EVIDENCE OF ISSUES BIFURCATED

STATE'S AMENDED APPRAISAL INSTRUCTIONS

7-31-89

Change to condition of services:

This Amendment is necessary to provide a concise written report on Parcel 20A to establish the following facts: (1) The date of taking the court alleges took place prior to the State's date of taking on said parcel; (2) To determine whether any business losses occurred as alleged by inverse proceedings; (3) To provide engineering costs; (4) To determine compensation, if any; (5) To determine if any diminution of value to property took place as a result of taking; and (6) To establish damages, if any. . . .

Dated July 31, 1989

EVIDENCE OF STATE "INFLUENCING" BOROUGH

STATE OF ALASKA

DEPARTMENT OF TRANSPORTATION AND PUBLIC WORK
CHIEF OF PLANNING AND RESEARCH

December 3, 1986
Re: Rezones, Right-of-Way Impacts

Rex Nutter
Director, Community Planning
Fairbanks North Star Borough
P.O. Box 1267
Fairbanks, AK 99707-1267

Dear Rex:

A number of recent rezones have greatly impacted right-of-way acquisition for Department of Transportation and public Facilities (DOT&PF) road improvement projects in the Fairbanks area. An example is RZ-028-86 (Bullwinkle/Peger Road). We are now faced with unnecessary condemnation proceedings and possible increased compensation costs as a direct result of this rezone appraisal. ... Since there is a limited budget to fund proposed projects, we would like to work with the Borough to seek a fair solution for future cases. Cost increases for any projects mean that other projects are delayed because of a lack of sufficient funding. . . .

While the department does not want to impede reasonable development of private property, it is not good public policy for local government to approve rezones just prior to scheduled road projects which then have the effect of significantly increasing the costs of the project for absolutely no gain to the public, and the additional effect of holding out the possibility of a windfall (in the form of increased condemnation proceeds) to private property owner at public expense. We don't believe the Fairbanks North Star Borough really wants or intends to be in the position of doing this, especially as our construction dollars become scare.

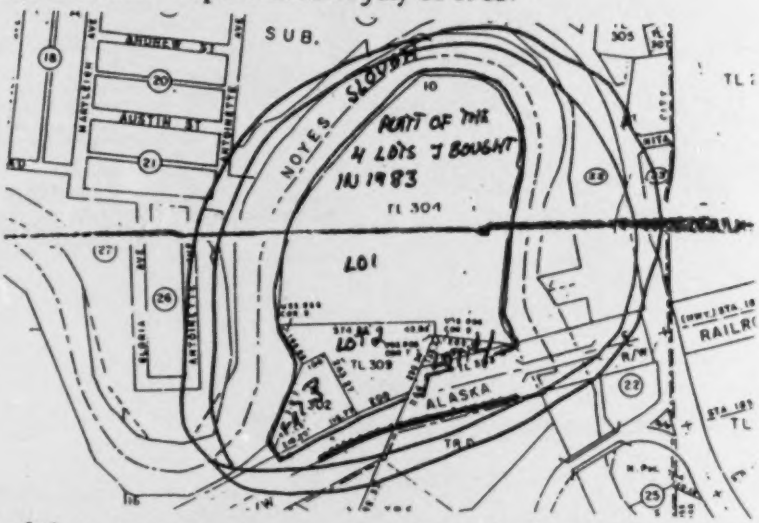
If you have any questions or suggestion, please contact me at 451-5150

Sincerely, John Martin, P.E. Chief of Planning & Research

cc: Cris Birch, Chief, Right-of-Way, Northern Region
H. Glencer, Jr. Deputy Commissioner, Northern Region
William B. McMullen, Director, D&C, Northern Region
Brian Phillips, City Manager, City of Fairbanks
Linda Walton, Assistant Attorney General, Fairbanks, Alaska

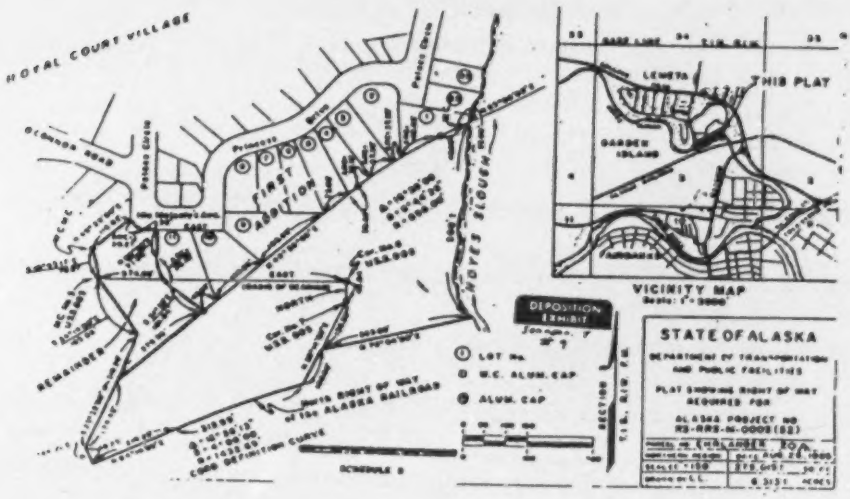
PLATS

Plat of the 4 lots we purchased in July of 1983:

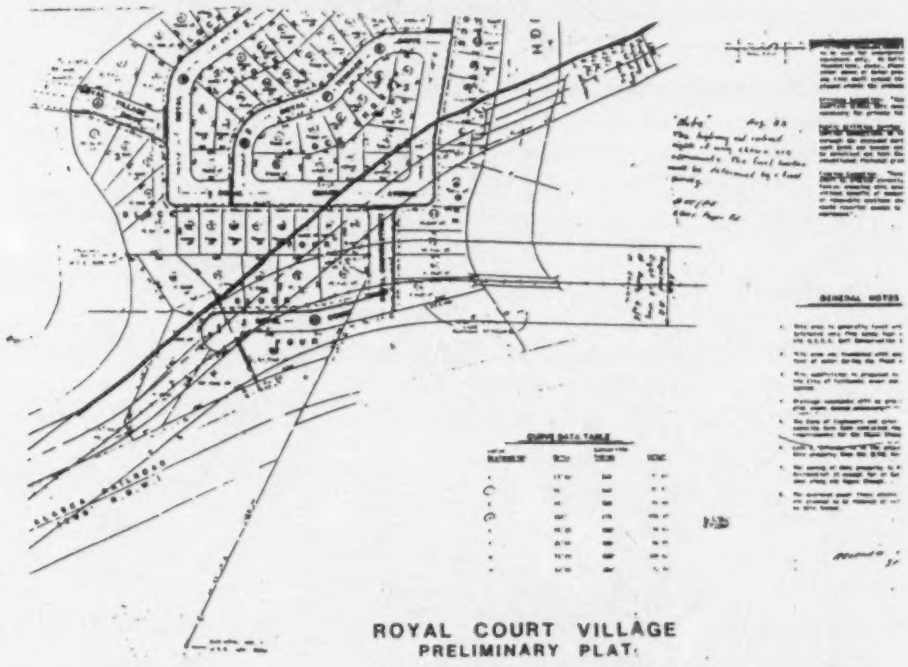


Plat of the property as it was on the date of taking in 1984 and 1986, including evidence of recent sales:

The one tract plat used by the State during the first trial:



Plat with highway superimposed by State DOT:



(3)

Supreme Court, U.S.
FILED
NOV 15 1996
CLERK

Case No. 96-682

IN THE UNITED STATES SUPREME ~~COURT~~
October term 1996

Lars W. Ehrlander,
Petitioner,

v.

Department of Transportation of Alaska, et al,
Respondents.

On Petition For Writ of Certiorari
to the Alaska Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARS W. EHRLANDER, Pro Se
161 Palace Circle
Fairbanks, Alaska 99701
Telephone: (907) 451-8342

5 pp

REPLY TO RESPONDENT'S ARGUMENT THAT OUR PETITION LACKS MERITS

Even though the respondent waived its right to file a brief in opposition, and thereby submitted to our petition's being factually correct, the respondent did argue that our petition lacked merit. Because that the petition focuses on why the Court should review the case rather than focusing on the merits of the issues, and because of the respondent's argument that the matters raised in our petition lack merit, I will briefly review some of the main issues.

PRE - TRIAL ISSUES (The first, 1987, "formal trial")

1. The trial court had found an inverse taking based on business interference and the fact that our family had been singled out to pay a disproportionate burden of a public project. The Alaska Supreme Court erred in *sua sponte* reversing the trial court on factual grounds, on a motion for summary judgment, and without the benefit of knowing the facts. The Supreme Court's error was particularly egregious because we had preserved the issues in a bifurcation agreement for future litigation.

2. The Alaska Supreme Court erred in permitting the State DOT to interfere with our development project in order to save costs on future acquisition. Whether the State acted unreasonably or interfered with our development should have been a jury issue.

3 The Alaska Supreme Court erred when it permitted the State to enter into a stipulated agreement to bifurcate vested property rights to a

future trial, and instead of enforcing the agreement, permitted the State to breach the agreement *when it was too late to appeal the first trial.* Then, unbelievably, the Court waived our constitutional rights to just compensation for the State's taking these rights, *based on our not appealing the first trial.*

FIRST TRIAL ISSUES:

NOTE: The first trial was only intended to establish the Borough's proportionate liability, the impaired value. We did not appeal the first trial because the remaining issues were preserved in a court order for a second trial. However, the Alaska Supreme Court's having arbitrarily denied our right to the second bifurcated trial has now created a situation where the State took several vested property rights absent any compensation and in violation of a multitude of state and federal laws.

1. The State *took* 4 or 15 [1] subdivided city lots subject to all city services. The State *paid for* a single tract of land located outside the city limits.

2. The State *took* lots that had been improved with utilities, roads, and a bridge for access at a cost exceeding $350,000.00. The State *did not pay anything for* the fixed improvements. In fact, it deducted the costs of improving the area [these issues were preserved for the second trial],

---

[1] The property consisted of 4 lots on the date of taking but would have consisted of 15 lots absent state interference.

even though the improvements were completed, approved and adopted by the city, and paid for in full by me, including paying the assessments in full for connecting our system to the city's. We were not paid for the improvements or for the enhanced value attributed to the improvements.

3. The State *took* prime building sites. The State *paid for* raw land that was unsuitable for construction owing to permafrost. Nor could a utility system be constructed on the property the State appraised.

4. The State *took* lots with valuable zoning permitting dense residential construction including apartment units. The State *paid for* inferior zoned land.

5. The State *took* centrally located property, in the city. The State *paid for* raw land located several miles outside the city.

6. The State *took* fully developed property. The State *deducted 20%* for an imaginary developer to do what I had already completed. The State also *deducted 15%* for profit to an imaginary land speculator among several other illegal deductions.

7. The State *took* retail property. The State *paid* wholesale value.

8. The State did not pay for the highest and best use of the land.

9. The State took the property in 1984, before it became impaired by the pending highway project, yet the State, sanctioned by the Alaska Supreme Court, paid a 1986 impaired value. The property was worth

$4.50 sf. in 1984 and only $1.79 in 1986. There was no other factor that caused this impairment than the pendency of the highway project. Instead of not including this impairment as required by both state and federal law, the State's payment reflected (included) the impairments.

10. The State and its officers misstated to the courts what property rights were actually taken.

POST TRIAL ISSUES:

1. The Bifurcation Agreement must be enforced.
2. The State's defaulting on the bifurcation agreement triggered the violation of several federal and state laws.
3. The State defaulted on its commitment to build an access road, making lots landlocked.
4. We did not receive just compensation for property rights that were taken. Furthermore, some issues were kept from the jury.
5. Our family had to pay a disproportionate share of a public project.
6. Our business was taken absent just composition or due process.
7. Our civil rights were violated.

Signed in Fairbanks, Alaska, this November 10, 1996.

By: Lars W. Ehrlander

Lars W. Ehrlander, pro se petitioner.